Jan 24/81 Sub. Mot. Dismiss

739

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 683.

GEORGE W. GRINNELL, H. P. EMERY, JOHN ROBINSON, JOSEPH THORNICH, MARY L. BRUCE, A. HAMMOND, S. E. OGBORN, E. E. OGBORN, GEORGE ULRICH, W. D. PACKARD, JOHN SLATER, JACOB WEAKLINE, LYDIA DUNHAM, ANDREW WILFONG, ED. PENNISTON, GEORGE DARLING, A. L. BELL, CHAS. BROWN, EBENEZER TREFEY, VIOLETTA ROPER, B. H. LATHROP, JOHN BRUCE, S. B. S. DUNCAN, WM. BRUCE, PLAINTIFFS IN ERROR,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, CHARLES STUART, AND JOHN TOMLINSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED NOVEMBER 3, 1879.

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1 Supreme court of Iowa.

Hon. J. M. Beck, ch. j.; Hon. Austin Adams, Hon. Wm. H. Seevers, Hon. J. H. Rothrock, Hon. J. G. Day, justices; E. J. Holmes, clerk.

Be it remembered that heretofore, to wit, on the 31st day of August, 1878, the appellant filed in the office of the clerk of the supreme court of Iowa his abstract of record in words and figures as follows, to wit:

1½ In the supreme court of Iowa, September term, 1878.

THE CHICAGO, ROCK ISLAND AND PACIFIC Railroad Co., appellee, *vs.* GEO. W. GRINNELL, APPELLANT. } No. 1.

Appeal from Shelby circuit court.

SAME APPELLEE *vs.* H. P. EMERY, APPELLANT. } No. 2.

Appeal from Audubon circuit court.

SAME APPELLEE *vs.* JOHN ROBINSON, APPELLANT. } No. 3.

Appeal from same court.

SAME APPELLEE *vs.* JOSEPH THARNISCH, APPELLANT. } No. 4.

Appeal from same court.

2 SAME APPELLEE *vs.* MARY L. BRUCE, APPELLANT. } No. 5.

Appeal from same court.

SAME APPELLEE *vs.* A. HAMMOND, APPELLANT. } No. 6.

Appeal from same court.

SAME APPELLEE *vs.* S. E. OGBORN, APPELLANT. } No. 7.

Appeal from same court.

SAME APPELLEE *vs.* E. E. OGBORN, APPELLANT. } No. 8.

Appeal from same court.

SAME APPELLEE
vs.
GEO. ULNILE, APPELLANT. } No. 9.

Appeal from same court.

CHARLES STEWART, APPELLEE,
vs.
W. D. PACKARD, APPELLANT. } No. 10.

Appeal from same court.

SAME APPELLEE
vs.
JOHN SLATER, APPELLANT. } No. 11.

Appeal from Crawford district court.

SAME APPELLEE
vs.
JACOB WEAKLIN, APPELLANT. } No. 12.

Appeal from Crawford district court.

SAME APPELLEE
vs.
LYDIA DUNHAM, APPELLANT. } No. 13.

Appeal from same court.

At law.

3 *Appellant's abstract of record.*

Sapp, Lyman & Ament, attorneys for appellant.
Wright, Gatch & Wright, att'ys for appellee.

THE C., R. I. AND P. R. R. CO., APPELLEE,
vs.
GEO. W. GRINNELL, APPELLANT. } No. 1.

Appeal from Shelby circuit court.

In the case plaintiff, on the 24th day of August, 1877, filed in the office of the clerk of the Shelby circuit court its petition, as follows:

The plaintiff, the Chicago, Rock Island and Pacific Railroad Company, a corporation organized and existing under the laws of the States of Illinois and Iowa, claims of the defendant, Geo. W. Grinnell, the possession of the following lands situated in the county of Shelby, in the State of Iowa, more particularly described as follows, to wit:

The southeast quarter of section 9, township 81, range 37, containing one hundred and sixty acres.

4 For cause of said claim the plaintiff alleges that it is the owner, in fee simple of the said land, and it appends hereto (as an ex-

hibit to this petition) an abstract of its title, and of the written evidence relied upon for the support of the same; that it is entitled to the present possession of the same, and that the defendant unlawfully keeps petitioner out of possession.

Wherefore it prays judgment against defendant for the immediate possession of said premises and the costs of this suit.

Exhibit.—Abstract of title.

The lands described in the foregoing petition were granted by the United States to the State of Iowa, to aid in the construction of a railroad from Davenport via Iowa City and Fort Des Moines to Council Bluffs; by the State of Iowa to the Mississippi Railroad Company; by the Mississippi and Missouri Railroad Company to certain trustees to secure the payment of bonds; by Thomas F. Withrow, special master in chancery of the circuit court of the United States for the district of Iowa, in execution of a decree entered by said court, foreclosing the deeds executed by said trustees to the Chicago, Rock Island and Pacific Railroad Company of Iowa, to the present plaintiff, the Chicago, Rock Island and Pacific Railroad Company, a corporation created by the consolidation of the Chicago and Rock Island Company of Illinois, with the above mentioned, the Chicago, Rock Island and Pacific Railroad Company of Iowa. The said lands were also conveyed directly by the United States to the plaintiff. As setting out said chains of title in greater detail, and as exhibiting the documentary evidence upon which plaintiff relies for the establishment of the same, reference is hereby made to the following acts of Congress and the general assembly of the State of Iowa, correspondence of and certificates by the executive officers of the Government of the United States and of the State of Iowa, decrees of the courts, and conveyances, viz:

5 I. The telegram, of which the following is a copy:

GENERAL LAND OFFICE, *May 10th*, 1856.

REGISTER AND RECEIVER, *Council Bluffs, Iowa:*

You will suspend from sale or location all the lands in your district until further orders.

Acknowledge the receipt of this dispatch by telegraph and mail.

THOS. A. HENDRICKS,
Commissioner.

II. An act of the Congress of the United States, approved May 15th, 1856, entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State."

III. The letter, of which the following is a copy:

GENERAL LAND OFFICE, *May 15th*, 1856.

REGISTER AND RECEIVER, *Council Bluffs, Iowa:*

GENTLEMEN: By my telegraph dispatch of the 10th inst. you were directed to suspend from sale or location all the lands in your district until further orders.

The object of this withdrawal was to protect from sale the lands granted to the State of Iowa for four railroads, running from the Mississippi River to the Missouri, by a bill which had passed both Houses of Congress.

Said bill, having this day been approved by the President, has become a law, and you will continue to hold the lands from sale or location until otherwise directed.

It is designed to adjust these several grants with as little delay as possible, in order that the lands remaining to the United States may be returned to market.

I am, very respectfully, your obedient servant,

THOS. A. HENDRICKS,
Commissioner.

6 IV. The letter, of which the following is a copy:

LAND OFFICE, COUNCIL BLUFFS, *May* 31, 1856.

SIR: Believing that orders for closing this office have been transmitted, and that through some cause they have been delayed or lost, I have taken the responsibility of closing this office against private entry until I shall receive further instructions from the department. This office was closed at a quarter past 10 o'clock this day. I shall continue to file declaratory statements, and take proof of pre-emptions, in all cases where the settlement was made prior to the closing of the office.

It appears clear to my mind that where the settlement is made prior to the location of the road, that the right of pre emption attaches, and that the State will be permitted to select other land in lieu thereof. To take any other view of the case would be doing great injustice to many actual settlers in this district.

I respectfully request instructions upon these points from the department.

Respectfully, your obedient servant,

LYSANDER W. BABBITT,
Register.

Hon. THOS. A. HENDRICKS,
Commissioner of the General Land Office, Washington City.

V. The following resolutions, adopted at a meeting of the board of directors of the Mississippi and Missouri Railroad Company, held at Davenport, June 2d, 1856, as follows:

"1. Resolved, That the entire subject of the grant of land made by Congress to the State of Iowa and the interest of this company therein be referred to Ebenezer Cook, Henry Farnam, Thomas C. Durant, and
7 N. B. Judd, as a committee and agents on behalf of this company, with full powers to negotiate and contract with any persons or corporations, to employ agents, and attend to and obtain such legislation, either in Congress or the State of Iowa, as they may think the interest of said company may require.

"2. Resolved, That the said committee of the company is hereby vested with full power to negotiate, arrange, and contract with the State of Iowa for any and all lands granted to the State of Iowa by the United States to aid in the construction of a railroad from Davenport to Council Bluffs; and they are authorized to execute any arrangement, agreement, acceptance, or contract, either under their own hands as agents, or to cause the same to be executed under the seal of the corporation, and the signatures of the president or vice-president, and of the secretary, the intention being to vest in such committee all the power of the board of directors in connection with that subject, and that the acts,

directions, and doings of such committee shall be binding upon this company."

Also the following resolution, adopted by above named committee:

"Resolved, That Hon. Bernhart Henn be appointed the agent of the Mississippi and Missouri Railroad Company, to proceed to Washington and make such arrangements in relation to the grant of lands to this company as in his opinion shall be most for its advantage; that he be authorized to engage such assistance at Washington as to him shall seem proper and desirable, and to incur such expenses as he may deem necessary in the prosecution of the business."

The original of these resolutions may be found in the records of the said Mississippi and Missouri Railroad Company.

VI. The letter, of which the following is a copy:

8 GENERAL LAND OFFICE, *June 19th*, 1856.

REGISTER AND RECEIVER, *Council Bluffs, Iowa:*

GENTLEMEN: Instructions having been sent you from this office by telegraph on the 10th ult., and subsequently by mail on the 15th ult., in reference to the withdrawal from market of certain lands in your district, in pursuance to an act of Congress approved on the 15th ult., making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State, you are advised that settlements are authorized upon any of the lands thus withdrawn, and rights of pre-emption may be required, as well to sections which may be odd numbers and within the six mile limits of the line of the railroads, as to the lands so reserved. By the first section of the act referred to, the United States can dispose of by pre-emption any of the lands thus withdrawn up to the time when the lines or routes of said roads are definitely fixed. Then, and not till then, will the right of the State attach under said act to all vacant lands in the odd numbered sections within the six mile limit.

Very respectfully, &c.,

THOS. A. HENDRICKS,
Commissioner.

VII. The letter, of which the following is a copy:

REGISTER'S OFFICE,
Council Bluffs, June 26th, 1856.

SIR: I have this day received your letter of the 13th inst., together with duplicates of your dispatch of the 10th ult., and your letter of the 15th ult., relative to the withdrawal of land in this district from market, which letters have been placed on file in this office.

Very respectfully, your obedient servant,

LYSANDER W. BABBITT,
Register.

Hon. COMMISSIONER GENERAL LAND OFFICE,
Washington City, D. C.

9 VIII. An act of the general assembly of the State of Iowa, approved July the 14th, 1856, entitled, "An act to except the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State.'"

IX. The letter of which the following is a copy:

REGISTER'S OFFICE,
Council Bluffs, July 14th, 1856.

SIR: I have received your letter of the 19th ult., in reference to the pre-emption of lands in this district which have been withdrawn from sale.

I am, sir, very respectfully, your obedient servant,
LYSANDER W. BABBITT,
Register.

Hon. Commissioner GENERAL LAND OFFICE,
Washington City, D. C.

X. The acceptance by said Mississippi and Missouri Railroad Company of the act of the general assembly above mentioned, as follows:

To His Excellency JAMES W. GRIMES,
Governor of the State of Iowa:

The Mississippi and Missouri Railroad Company hereby certify and declare that they have assented to and accepted, and do hereby accept the act of the general assembly of the State of Iowa, entitled "An act to accept of the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,'" approved May 15th, 1856, passed and approved on the 14th of July, one thousand eight hundred and fifty-six, and this certificate is presented in compliance of the requirments of said act, and particularly of the thirteenth section thereof.

In witness whereof, and in pursuance of a resolution of the board of directors, the said Mississippi and Missouri Railroad Company have caused their corporate seal to be affixed, and the signature of the proper officers to be subscribed, this seventeenth day of July, A. D. 1856.

[L. S.] EBENEZER COOK,
Vice President Mississippi and Missouri Railroad Co.

H. PRICE,
Sec'y Miss. and Mo. Railroad Co.

The original paper is on file in the office of the secretary of state, at Des Moines, Iowa.

XI. The plat or map showing the location of the route and line of Mississippi and Missouri Railroad from Davenport via Iowa City and Fort Des Moines to Council Bluffs, entitled "Map of the located line of the Mississippi and Missouri Railroad from Davemport to Council Bluffs," and having the following certificate endorsed thereon:

OFFICE OF MISSISSIPPI AND MISSOURI RAILROAD COMPANY,
Davenport, Aug. 6th, 1856.

It is hereby certified, in pursuance of the act of the legislature of the State of Iowa, approved July 14th, 1856, entitled "An act to accept of the grant, and carry into effect the trust conferred upon the State of Iowa, by an act of Congress entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in construction of railroads in said State,'" approved May 15th, 1856; that this map shows the location of the route and lines of the Mississippi and Missouri Railroad from Davenport via Iowa City and Fort Des Moines to Council Bluffs.

In testimony whereof the said company has caused this certificate to

be signed by the vice-president and chief-engi'eer of said company
11 and attested by the secretary, and the seal of the company hereunto affixed, the day and year first above written.

[SEAL.] EBENEZER COOK,
Vice President.
B. B. BRAYTON,
Chief Engineer.

H. PRICE,
Secretary.

STATE OF IOWA;

I, James W. Grimes, governor of the State of Iowa, do hereby certify and declare that the plat or map annexed has been filed in this office by the president of the Mississippi and Missouri Railroad Company, as showing the location of the line of the road of said company, in consequence of provisions of the law of said State.

In testimony whereof I have hereunto set my hand and affixed the great seal of said State.

Done at Iowa City this 9th day of August, A. D. 1856.

JAMES W. GRIMES.

By the governor:
GEO. W. MCCLEARY,
Secretary.

Filed in the General Land Office, 11th September, 1856, by Hon. Bernhart Henn, with his letter of same date.

W. T. S.

The original map is on file in the General Land Office, Washington City.

XII. A resolution adopted by the board of directors of the Mississippi Railroad Company, on the 19th day of August, 1856, as follows:

"Resolved, That the doings and acts of the committee in that behalf be, and the same are hereby, approved; and that the acceptance of the act passed by the legislature of the State of Iowa, entitled 'An act to accept of the grant and carry into execution the trust conferred
12 upon the State of Iowa by an act of Congress, entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,' approved May 15th, 1856, in the office of the secretary of state of the State of Iowa, be, and the same is hereby, ratified and confirmed."

The original is on file with the records of the Mississippi and Missouri Railroad Company.

XIV. The letter, of which the following is a copy:

CHICAGO, ILL., *Sept. 4th*, 1856.

SIR: For and in behalf of the State of Iowa and the four several railroad companies which by the act of the legislative assembly of said State, approved July 14th, 1856, were constituted the beneficiaries of the grants of land made to said State by the acts of Congress, approved May 15th, 1856, and as the legally appointed agent of said State and of said companies, I hereby select the unsold lands in the sections and parts of sections designated by odd numbers, between the six and fifteen mile limits on each of the roads, to make up the deficiency caused in the odd numbered sections within the six mile limits, by sales or valid

pre-emption rights existing prior to the grants made to said State by said act of Congress.

Very respectfully, your ob't serv't,

BERNHART HENN,
Agent, &c.

Hon. THOS. A. HENDRICKS,
Com'r Gen'l Land Office, Washington City, D. C.

XVI. The letter, of which the following is a copy:

WASHINGTON CITY, *Sept. 11th*, 1856.

Hon. THOMAS A. HENDRICKS,
Commis'r of Gen'l Land Office:

SIR: I have the honor to hand you herewith a map designating the line of the Mississippi and Missouri Railroad, as 'definately fixed' by the Mississippi and Missouri Railroad Company, in accordance
13 with the act of Congress making a grant of lands to the State of Iowa, approved May 15th, 1856, and the act of the legislative assembly of said State, approved July 14th, 1856, and on the part of said company and the governor of said State, I would respectfully request that the same may be filed in your office.

Very respectfully, your ob't serv't,

BERNHART HENN,
Agent, &c.

XVII. The letter, of which the following is a copy:

GENERAL LAND OFFICE.
September 11th, 1856.

Hon. BERNHART HENN,
Washington, D. C.:

SIR: I have to acknowledge the receipt of a communication of this date, and of the map of the route of the Mississippi and Missouri Railroad as definitely fixed by the company, therewith, filed in this.

It is perceived that the certificate of the governor omits the words "definitely fixed under the act of Congress, approved 15th May, 1856," as in the case of the Burlington and Missouri River Railroad, which I have to request may be remedied by trasmitting a supplemental certificate to be annexed to the map.

I am, very respectfully, your ob't serv't,

JOHN HOOD,
Acting Commissioner.

XVIII. The letter, of which the following is a copy:

GENERAL LAND OFFICE,
October 3d, 1856.

REGISTER AND RECEIVER,
Council Bluffs, Iowa:

GENTLEMEN: On the 15th of May, 1856, an act of Congress was approved making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State; and on the 24th of July last an act passed the legislature of Iowa accepting the grant.

14 The object of this is to call upon you, upon the filing, by the

proper State agent in your office, the line of route for the Mississippi and Missouri Railroad, one of the routes designated in the act of the legislature aforesaid, to make a succinct report, stating the fact of the filing of the route, the date when filed, the name of the agent, and the evidence of his authority. You will, at the same time, send on a carefully prepared list, authenticated by your signatures, showing each section and parts of sections within the township and range, cut by the line of route.

You will bear in mind the purport of the foregoing, and pursue the same course in regard to the lines of routes in your district for the other roads authorized by the acts above mentioned, taking heed to have the list of the cut sections and parts of sections prepared with perfect accuracy.

I am, very respectfully, your obedient servant;

THOMAS A. HENDRICKS,
Commissioner.

* * * * * * *

XXI. The letter, of which the following is a copy:

DEPARTMENT OF THE INTERIOR,
October 18th, 1856.

SIR: Your letter of the 11th inst. on the subject of the grant of the lands in Iowa, made by act of 15th May last, has been received.

That having relation to the withdrawal of the lands, so as to exclude pre-emptions, in common private entries, having been duly considered, your recommendation to that effect is adopted, so as to preclude the allowance of any pre-emption claim until further orders, embracing any lands within the limits of the fifteen miles, for the purposes of the respective grants.

Respectfully, your obedient servant,

R. McCLELLAND,
Secretary.

To Hon. THOS. A. HENDRICKS,
Commissioner of the General Land Office.

15 * * * * * * *

XXIII. The telegram, of which the following is a copy:

GENERAL LAND OFFICE,
Washington, October 20th, 1856.

REGISTER AND RECEIVER,
Council Bluffs, Iowa:

GENTLEMEN: After receipt of this no pre-emptions are to be admitted within the fifteen mile limits of the recent railroad grants. Acknowledge by mail.

THOS. A. HENDRICKS,
Commissioner.

XXIV. The letter, of which the following is a copy:

GENERAL LAND OFFICE,
October 20th, 1856.

REGISTER AND RECEIVER,
Council Bluffs, Iowa:

GENTLEMEN: As ordered by telegraphic dispatch of this date, pre-

emptions are interdicted, after the receipt at your office of that dispatch, within the fifteen mile limits of the railroad grants made by the act of Congress approved 15th May, 1856.

Diagrams showing the exact limits above mentioned, and the routes of the roads now being laid down upon the maps in this office, will be forwarded to you as early as practicable.

Very respectfully, your obedient servant,

THOS. A. HENDRICKS,
Commissioner.

XXV. The letter, of which the following is a copy:

LAND OFFICE,
Council Bluffs, October 29th, 1856.

SIR: We have this day received a dispatch from your office,
16 via Dubuque, Iowa, dated October 20th, 1856, relative to pre-emptions within the fifteen mile limits of the recent railroad grants.

Very respectfully, your obedient servant,

JAMES POLLARD, *Register.*
ENOS LOWE, *Receiver.*

Hon. COMMISSIONER GENERAL LAND OFFICE,
Washington City, D. C.

XXVI. The letter, of which the following is a copy:

LAND OFFICE,
Council Bluffs, November 15th, 1856.

SIR: Your letter of the 3d ult., calling the attention of this office of the filing of the line of route for the Mississippi and Missouri Railroad, has been received.

In reply, we would state that there is upon file in this office a plat showing the line of route of said railroad, the same being certified to by the vice-president, chief engineer and secretary of said railroad company, with a certificate of the governor of the State of Iowa that the same was duly filed in his office.

It appears from a certificate of the late register, endorsed upon said plat, that it was filed in this office upon the 19th day of August, 1856, by Edward House, esq., one of the engineers of said company.

Herewith we transmit a list, showing each section and parts of sections, with the township and range cut by the line of route.

Very respectfully,

JAMES POLLARD, *Register.*
ENOS LOWE, *Receiver.*

Hon. COMMISS'N'R GENERAL LAND OFFICE,
Washington, D. C.

17 XXIX. An act of the general assembly of the State of Iowa, approved January 28th, 1857, entitled "A supplement to An act entitled 'An act to accept the grant and to carry into execution the trust conferred on the State of Iowa by an act of Congress entitled An act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,' approved May 15th,

1856, which said act of the legislature of Iowa was approved July 14th, 1856."

XXXII. The letter, of which the following is a copy:

DEPARTMENT OF THE INTERIOR,
March 2d, 1857.

SIR: I return herewith the papers accompanying your letter of the 3d February last, accompanied by a copy of the opinion of the Attorney-General on the matter, dated the 16th ult.

The original of said opinion having been informally submitted to you a few days since with a view to your preparation of suitable instructions to carry out said opinion as adopted by the department, and such instructions having been submitted in your letter of this date, they are herewith returned with my approval.

Respectfully, your ob't serv't,

R. McCLELLAND,
Secretary.

To Hon. THOS. A. HENDRICKS,
Commissioner of the General Land Office.

XXXIII. The letter, of which the following is a copy:

GENERAL LAND OFFICE,
March 3d, 1857.

REGISTER AND RECEIVER,
Council Bluffs, Iowa:

GENTLEMEN: By the act of Congress, approved 15th May, 1856, granting lands to the State of Iowa for railroads, the right of the
18 State attaches when the lines of road are definitely fixed. The question has been under consideration as to the evidence the department shall require of this fact.

In opinion of the 16th February, 1857, the Attorney-General holds that "by surveying and marking the lines on the ground, those lines are definitely fixed."

The authenticated plat required of the State then must show the survey and final location of the road, as actually staked off and fixed on the face of the earth, and the inchoate right of the State will consequently attach from the several periods of time that the railroad work has been or may be executed in the manner stated. It follows, therefore, that the maps exhibiting the routes thus "definitely fixed" must be accompanied by testimony which may be an extract from the field-book of the engineer of the road, sworn to by the officers, showing the several and successive portions of the lines of route thus fixed, with the dates when the same were executed, as hereinbefore indicated.

Very respectfully, your ob't serv't,

THOS. A. HENDRICKS,
Commissioner.

* * * * * * *

XXXV. The letter, of which the following is a copy:

GENERAL LAND OFFICE,
April 1st, 1857.

Hon. B. HENN, present:

SIR: I have received your letter of present date, with a supplemental

map of the road "definitely fixed," of the Mississippi and Missouri Railroad, under act of 15th May, 1856.

1st. The attention of this office is drawn to the fact that at the western terminus there is a proposed rectification of the line to give it directness, whereby its length is shortened some five miles. Upon that ground this office sanction the proposition.

2d. There are other deflections suggested, but they are either so inconsiderable, or controlled by the principle recognized under the first head, as to justify the office in interposing no objection to the same.

Very respectfully, your obedient servant,

THOS. A. HENDRICKS,
Commissioner.

XXXVI. The supplemental map showing the line of the Mississippi and Missouri Railroad as amended, filed at the office of the Secretary of State for the State of Iowa, on the 19th *of* day of March, 1857, and in the General Land Office, at Washington, April 1st, 1857.

XXXVII. The deed of trust executed by Mississippi and Missouri Railroad Company to Thomas E. Walker and Curtis B. Raymond, conveying to the said grantees land and other property owned by said company, to secure the payment of certain bonds therein described, which deed of trust was dated May the 8th, 1857, and was recorded in the office of the recorder of deeds for Shelby County, on the day of , A. D. 18 , in Mortgage Record Book H, at page 142.

XXXVIII. The certificate of the proper officers of the Department of the Interior of the United States, of the State of Iowa, bearing date December 27th, A. D. 1858, setting out a list of the lands enuring to said State under the said grant of May 15th, 1856, to aid in the construction of a railroad from the city of Davenport by way of Iowa City and Fort Des Moines to Council Bluffs, on the Missouri River, which certificate is on file in the office of the register of the State land office at Des Moines, and was recorded in the office of the recorder of Shelby County, on the 10th day of Dec., A. D. 1873, in book L, of record , at pages 229 and 234.

XXXIX. The deed of trust executed by the said Mississippi and Missouri Railroad Company to Thomas C. Durant, Jacob S. Wetmore, and Robert B. Minturn, jr., conveying to said grantees, as trustees, the lands above described and other property, to secure the payment of certain bonds therein described, which deed of trust was dated the 10th of December, A. D. 1861, and was recorded in the office of the recorder of Shelby County, on the day of , A. D. 18 , in mortgage record D, at page 56.

XLII. The act of the Congress of the United States, approved June 2d, 1864, entitled "An act to amend an act entitled 'An act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,' approved May 15, 1856."

XLIII. The decree of the circuit court of the United States for the district of Iowa, entered on the 10th day of May, A. D. 1866, in a certain cause wherein Thomas C. Durant, Jacob S. Wetmore, and Robert B. Minturn, jr., were complainants, and the Mississippi and Missouri Railroad Company, and Edward W. Dunham, Thomas E. Walker, Franklin Haven, Mark Howard, and John Webbee were defendants in the original bill, by the terms of which the above-mentioned deeds of trust were foreclosed, and a sale of the mortgaged premises ordered to be made by Thomas F. Withrow, special master in chancery, in default of the pay-

ment of certain sums therein named; which decree remains of record in said court.

XLIV. The articles of association of the Chicago, Rock Island and Pacific Railroad Company, a corporation organized under the laws of the State of Iowa; which articles were filed in the office of the secretary of state for the State of Iowa, on the 12th day of June, A. D. 1866, and filed in the office of the recorder of Scott County, on the 31st day of May, A. D. 1866, and recorded in corporation record A, at pages 301, 302, 303, 304; also amendment of same, executed on the 23d day of July, 1866, and filed for record in the office of the recorder of Scott County, Iowa, on the 28th day of July, 1866, and recorded in corporation record A, at pages 311 and 312, and filed in the office of the Secretary of State, August 29, 1866.

21 XLV. The deed executed by Thomas F. Withrow, the special master aforesaid, in compliance with the terms of said decree and pursuant to a sale made thereunder, conveying all of the railroad and lands of the Mississippi and Missouri Railroad Company to the Chicago, Rock Island and Pacific Railroad Company above mentioned; which deed was filed for record in the office of the recorder of Shelby County, on the 9th day of Dec., A. D. 1867, and was recorded in Land Record F, at pages 236 and 246.

XLVI. The articles of consolidation entered into between the Chicago and Rock Island Railroad Company, a corporation of the State of Illinois, and the above mentioned Chicago, Rock Island and Pacific Railroad Company of Iowa, which articles bear date August 20th, 1866, and were duly filed in the office of secretary of state for the State of Iowa.

XLVII. An act of the general assembly of the State of Iowa, approved February 11th, 1868, entitled "An act providing for and requiring the early construction of the Chicago, Rock Island and Pacific Railroad from Davenport to Council Bluffs, Iowa, upon certain conditions therein named."

XLVIII. The acceptance by the said Chicago, Rock Island and Pacific Railroad Company of the act above mentioned, bearing date the 26th day of March, A. D. 1868, and filed for record about said date in the office of the secretary of state for said State.

XLIX. The certificate of the honorable Samuel Merrill, governor of the State of Iowa, bearing date on the 31st day of December, A. D. 1869, a duplicate original of which is on file in the office of the secretary of state for the State of Iowa, and of which the following is a copy:

I, Samuel Merrill, governor of the State of Iowa, do hereby certify that the Chicago, Rock Island and Pacific Railroad Company,
22 which said company became the successors of the Mississippi and Missouri Railroad Company, by purchase at a judicial sale, made under and by virtue of a decree of the district court of the United States for the district of Iowa, of all the property, real, personal, and mixed, rights and franchises of the said Mississippi and Missouri Railroad Company, have this day filed in the proper office of this State a map of the modified line of said railroad from Kellogg, in Jasper County, by the way of Newton and Des Moines to the Missouri River, at Council Bluffs, as authorized by an act of Congress, entitled "An act to amend an act entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State,' approved May 15th, 1856," which said act was approved June 2d, 1864, and that the map to which this certificate is attached is a cor-

rect copy of the map so filed of said modified line, and shows, in connection with the public surveys, the correct line of said railroad as now constructed.

I do further certify that the whole of said line of railroad from Davenport, in the county of Scott, to Council Bluffs, in the county of Pottawattamie, was fully completed and in operation by the passage of daily trains over the entire length thereof, on the 6th day of June, A. D. 1869; that the entire length of said railroad, as shown by the chief engineer's statement, is three hundred and fifteen (315) miles.

That the said railroad is built and equipped in a manner equal to any first-class road in the West, and that it has been constantly operated since the said 6th day of June by the said Chicago, Rock Island and Pacific Railroad Company.

And I do hereby further certify that the said Chicago, Rock Island and Pacific Railroad Company, by virtue of the purchase at judicial sale as aforesaid, and by virtue of an act of the general assembly of the State of Iowa, entitled "An act to accept of the grant, and carry into execution the trust conferred upon the State Iowa, by an act of Con-
23 gress entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,'" approved July 14th, 1856, and by virtue of an act of the general assembly of the State of Iowa, entitled "An act providing for and requiring the early construction of the Chicago, Rock Island and Pacific Railroad from Davenport to Council Bluffs, Iowa, upon certain conditions therein named," approved February 11th, 1868, is entitled to receive all the lands granted to the State of Iowa, and to the Mississippi and Missouri Railroad Company, for the purpose of aiding in the construction of a railroad from the city of Davenport, via Iowa City and Fort Des Moines to Council Bluffs, by the several acts of Congress, entitled "An act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," approved May 15th, 1856, and an act to amend an act entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State, approved May 16th, 1856," approved June 2d, 1864.

In testimony whereof I have hereunto set my hand and caused to be hereto affixed the great seal of the State of Iowa, this thirty-first day of December, 1869.

[L. S.] SAMUEL MERRILL.

By the governor.

ED. WRIGHT,
Secretary of State.

At the October term, 1877, of said court, the defendant filed his answer, as follows:

1st. A denial of each and every allegation of the petition.

* * * * * * * *

4th. Defendant further says that on the day of September,
24 1872, he, with his family, entered on the land in question, having made application at the proper local land office for entry of said land, under the act of Congress of May 20th, A. D. 1862, commonly known as the homestead law, defendant being fully competent and qualified to make such entry, and believing that he had a just and lawful claim to said land by reason of said facts aforesaid, made lasting and valuable improvements thereon, to wit, put 110 acres of said land in cultivation, built a house thereon worth five hundred dollars, planted

orchards, hedge fences, and groves, and increased the value of said land two thousand dollars, all of which said improvements were so made by defendants with the full knowledge of plaintiff, its agents, servants, and officers, and at no time until the commencement of this suit did plaintiff, its agents, officers, or servants make objections thereto.

5th. Defendant further says that on the day of September, 1872, he being the head of a family, and in all respects qualified to make entry of land as provided by the act of Congress approved May 20th, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," did make applications for entering said lands in controversy under said act of Congress aforesaid, and did do all needful acts as prescribed by said law, and at all times since has resided on said lands with his family, and in each and every respect within his power has complied with the statute aforesaid; that the said land is more than twenty miles distant from the line of road of plaintiff as definitely fixed and located and built; that on the 31st day of January, 1873, as well as at all times after the day of Sept., 1872, the defendant, with his family, had settled and was living on said land in good faith, and was then occupying the same under the said act of Congress aforesaid, of May 20th, A. D. 1862, which said settlement and occupation was confirmed and made complete and declared to be a good and valid title to said land, by an act of the Congress of the United States, known as the conformatory act, approved January 21st, 1873.

25 On the 31st day of March, 1878, said cause came on to be tried to the court and a jury, and on said trial the following proceedings were had and done, as shown by the bill of exceptions filed in said court in due time, to wit:

Plaintiff introduce the following evidence:

Telegram from General Land Office to the register and receiver of the local office at Council Bluffs, dated May 10th, 1856. (Exhibit No. 1 to petition.)

To which defendant objected as immaterial. Objection overruled, and defendant excepts.

Act of Congress approved May 15th, 1856, entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State." (11 Statute at Large, 9.)

Letter from the General Land Office to the register and receiver at Council Bluffs, Iowa, under date of May 15th, 1856. (Exhibit No. 3 to petition.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

26 Letter from register of the land office at Council Bluffs to Commissioner of General Land Office, dated May 3d, 1856. (Exhibit No. 4 to petition.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Resolutions of the Mississippi and Missouri Railroad Company. (Exhibit No. 5 to petition.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Letter from the General Land Office to register and receiver at Council Bluffs, under date of June 19th, 1856. (Exhibit No. 6 to petition.

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Letter from land office at Council Bluffs, Iowa, to Commissioner of

General Land Office, under date of June 26th, 1856. (Exhibit No. 7 to petition.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

27 Act of the general assembly of the State of Iowa, approved July 14th, 1856, being chapter I of the acts of the extra session of the 5th general assembly. (Exhibit No. 8 to petition.)

Letter from the register of the local land office at Council Bluffs, Iowa, to Commissioner of the General Land Office, dated July 14th, 1856. (Exhibit No. 9 to petition.)

To which defendant objected as immaterial. Objection overruled. by the court. Defendant excepts.

Acceptance of Mississippi and Missouri Railroad Company. A letter from Ebenezer Cook, vice president of the Mississippi and Missouri Railroad Company, to Jas. W. Grimes, governor of Iowa, accepting the benefit of the act of the legislature of the State of Iowa, approved July 14th, 1856. [Exhibit No. 8.] (Exhibit No. 10 to petition.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Map filed in the office of the governor of the State of Iowa, August 9th, 1856, and in the General Land Office September 11th, 1856,

28 together with the certificates of Ebenezer Cook, V. Best, B. B. Brayton, chief engineer, and H. Price, secretary Mississippi and Missouri Railroad Company, James W. Grimes, governor of the State of Iowa, and W. T. S., thereto attached. (Exhibit No. 11 to petition.) This map shows the proposed line so far north of the line on which the railroad was finally built that the land in controversy would have been within the fifteen mile limit had the road been built thereon. It is the same map referred to in Exhibit No. 17 to the petition.

To which defendant objects as immaterial. Objection overruled. Defendant excepts.

Resolution of the Mississippi and Missouri Railroad Company, dated August 19th, 1856. (Exhibit No. 12 to the petition.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Letter dated Chicago, Ill., Seoptember 4th, 1856, from Bernhart Henn to Thos. A. Hendricks, Commissioner of the General Land Office. (Exhibit No. 14 to petition.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Letter dated Chicago, Ills., September 11th, 1856, from Bern-

29 hart Henn to Commissioner General Land Office. Exhibit No. 16 to petition.

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Letter same date, from Acting Commissioner General Land Office to Bernhart Henn. (Exhibit No. 17 to petition.)

To which defendant objected as immaterial. Objection overruled, and defendant excepts.

Letter dated October 3d, 1856, from Commissioner General Land Office to register and receiver at Council Bluffs, Iowa. (Exhibit No. 18 to petition.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Letter dated October 18th, 1856, to the Commissioner of General

Land Office, from the Secretary of the Interior. (Exhibit No. 21 to petition.)

To which defendant objected as immaterial. Objection overruled by the court. Defendant excepts.

Telegram dated October 20th, 1856, from Thos. A. Hendricks, Commissioner, to the register and receiver, Council Bluffs, Iowa.
30 (Exhibit No. 23 to petition.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Letter dated October 20th, 1856, from the Commissioner of the General Land Office, to the register and receiver at Council Bluffs, Iowa. (Exhibit No. 24 to petition.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Letter dated October 29th, 1856, from register and receiver, Council Bluffs, Iowa, to the Commissioner of the General Land Office. (Exhibit No. 25 to petition.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Letter from the register and receiver, Council Bluffs, Iowa, dated November 15th, 1856, to the Commissioner of the General Land Office. (Exhibit No. 26 to the petition.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Act of the general assembly of Iowa, passed at the regular
31 session of the 6th general assembly, and approved January 28th, 1857, being chapter 182 of the acts of the regular session of the general assembly of the State of Iowa. (Exhibit No. 29 to petition.)

To which defendant objects as immaterial. Objection overruled. Defendant excepts.

Letter dated March 3d, 1857, from the Secretary of the Interior to the Commissioner of the General Land Office. (Exhibit No. 32 to petition.)

To which defendant objected as immaterial. Objection overruled, and defendant excepts.

Letter dated March 3d, 1857, to the register and receiver at Council Bluffs, Iowa, from the Commissioner of the General Land Office. (Exhibit No. 33 to petition.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Letter dated April 1st, 1867, from the Commissioner of the General Land Office to Bernhart Henn. (Exhibit No. 35 to petition.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

32 Supplemental map filed n the office of the secretary of state for the State of Iowa, on the 19th of March, 1857, and in the General Land Office April 1st, 1857. This map shows the line of the railroad substantially as Exhibit No. 11. (Exhibit No. 36 to petition.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Deed of trust from the Mississippi and Missouri Railroad Company to Walker & Raymond, trustees, filed for record in Shelby County on the 15th day of June, 1857, and dated the 1st day of May, 1857. This

instrument first recites in extenso the act of Congress of May 15, 1856, hereinbefore referred to. It next sets out in full the act of the legislature of the State Iowa of July 18th, 1856, also hereinbefore referred. It then rehearses in full the act of the general assembly of the said State, approved January 28th, 1857, also hereinbefore set out. Then follows the following statement of the purpose of its executive, to wit:

"And whereas the party of the first part for the purpose of raising funds from time to time for the construction and completion of the railroad hereinafter described, and the payment of the necessary expenditures for that purpose, proposes to execute and deliver to the parties of the second part their construction bond or obligation in pursuance of the provisions of the last above recited act of the general assembly of the State of Iowa, approved the 28th day of January, 1857, and thereby to become indebted to various persons, bodies politic and corporate, who shall become holders of said construction bonds or
33 obligations in the sum of seven millions of dollars lawful money of the United States, secured to be paid by seven thousand construction bonds or obligations of said company of and for the sum of one thousand dollars each, making in the whole the said sum of seven millions of dollars, to be issued and secured by the terms and conditions of this instrument, each of which lands shall provide for the payment unto the said persons, bodies politic or corporate, who may become the holders thereof, the sum of one thousand dollars on the eighth day of May, eighteen hundred and seventy-seven, and also for the interest on the same, at the rate of seven per cent. per annum, payable on the eighth day of November, and every ensuing the date of said bonds until the principal sum named therein respectively shall be paid and satisfied according to the tenor thereof, each of said bonds to be authenticated by a certificate signed by the said trustees, and to be in the following form."

Then follows the form of the bonds therein referred to, and after that a statement of the obligations and conditions of the instrument, as follows:

"Now, therefore, this indenture witnesseth, that the said party of the first part, for securing the payment of the sums of money mentioned in the said construction bonds or obligations and the interest thereon, and also in consideration of the sum of one dollar in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed and confirmed, and by these presents do grant, bargain, sell and convey and confirm unto the said parties of the second part, and to their successors who may be appointed or selected in the manner and according to the conditions hereinafter set forth, all and singular the railway stations, depot land, and other lands appurtenant to said railroad now owned or hereafter to be acquired by the said party of the first part, constituting or belonging to the railroad of the said party of the first part, extending from Iowa City, in the State of Iowa, to Council Bluffs on the Missouri river, being part of the railroad of said company, extending from the city of
34 Davenport, on the Mississippi River, to said Council Bluffs, on the Missouri River, together with all the locomotives, cars, buildings, machinery, tools, or implements whatever appurtenant thereto, the above described division of railroad and all the franchises, rights and privileges appurtenant to said division now existing, or hereafter to be acquired. Also, all right, title, interest, claim, or demand which said party of the first part now has or shall hereafter acquire in or to all public lands of the United States, granted by the above recited act

of Congress, approved May 15th, 1856, to the State of Iowa, and by the general assembly of said state, by the above recited act approved July 14th, 1856, to the said Mississippi and Missouri Railroad Company, the party of the first part, subject, however, to the conditions of the above recited act of Congress, and the above recited act of the general assembly of the state of Iowa, with all the estate, right, title and interest, property and possession, claim or demand whatever at law or in equity, of the said party of the first part in and to the same, and each and every part and parts thereof, excepting, saving and reserving to the party of the first part all lands now owned or hereafter to be acquired by the said party of the first part, which may not be included in said grant of public lands from the United States, and may not be necessary for the uses and purposes of said railroad, and the depot and rights of way thereof. To have and to hold all and singular the land and premises hereby granted or intended to be granted, and each and every part or parcel thereof, with the appurtenances thereunto belonging, unto the said parties of the second part, or the survivors of them and their successors appointed or elected in the manner hereinafter provided for the uses and purposes, and for the trusts, terms, and conditions in this indenture set forth and declared: Provided, always, and these presents are upon the express condition that if the said party of the first part shall well and truly pay or cause to be paid to the holder of said
35 construction bonds, and every one of them, the principal sums of money therein mentioned, according to the true intent and meaning thereof, with the interest thereon, at the time and in the manner hereinbefore provided according to the true intent and meaning of these presents, that then and from thenceforth this indenture, and the estate hereby granted, shall cease and determine, and all the right, title, and interest in all the property hereby conveyed to the parties of the second part not then disposed of by them under the powers hereby conferred upon them, shall revert to and vest in the party of the first part."

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Certified list of lands certified to the State of Iowa, under the act of May 15th, 1856, being a list of lands outside of the six miles and within the fifteen miles limit of the line of road as shown by the maps, Exhibits Nos. 11 and 36 to the petition, and hereinbefore set out, of the reserve to satisfy the grant made to the State of Iowa by act of Congress approved May 15th, 1856, and hereinbefore set out, certified to by the Commissioner of the General Land Office, and filed for record in the recorder's office of Shelby County, December 10th, 1874, and especially so much of said list as shows the whole of section No. 9, township 81, range 37. Certificate dated December 27th, 1858.

Second mortgage executed by Mississippi and Missouri Railroad Company to Thos. C. Durant, Jacob S. Whitmore, and Robert B. Minturn, dated December 10th, 1871, filed in record March 10th, 1862, in the recorder's office of Shelby County, Iowa. This instrument is similar in every particular to the one already set out herein given to Walker & Raymond.

36 To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Act of Congress, approved June 2d, 1864, entitled "An act to amend an act entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State, approved May 15th, 1856.'" (13 U. S. Statutes at Large, 95.)

Decree of the circuit court of the United States for the district of

Iowa, rendered on the 8th day of May, 1866, in a case wherein that C. Durant, et al. were plaintiffs, and the Mississippi and Missouri Railroad Company et al. were defendants in the original bill, and in which Edward W. Dunham was plaintiff, and said Mississippi and Missouri Railroad et al. were defendants in cross-bill, and in which Thos. E. Walker et al. were plaintiffs, and the said Mississippi and Missouri Railroad Company et al. were defendants in a second cross-bill, and especially so much of said decree as describes the land in controversy. In that decree the deeds of trust hereinbefore set out were foreclosed, and a sale of the improved premises ordered to be made by Thomas F. Withrow, special master in chancery, in default of certain sums therein named. The land in controversy lies in the division of said road lying between Iowa City and Council Bluffs, and is so described in said decree, and in ordering the decree and in ordering the sale thereof, the court using the following words: "Also all the right, title, interest, claim, or demand, which said railroad company had, at the date of said mortgage, or has since acquired, in and to all public lands of the United States, granted by the act of Congress approved May 15th, 1856, and set out in said mortgage to the State of Iowa, and by the general assembly of
37 said State, by the act thereof recited in said mortgage, approved July 14th, 1856, to the said Mississippi and Missouri Railroad Company."

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Articles of association of the Chicago, Rock Island and Pacific Railroad Company of Iowa, filed in the office of the secretary of state, June 12th, 1866, and in the office of the recorder of Scott County, May 31st, 1866, and duly recorded. Also an amendment thereto, duly executed.

Master's deed from Thomas F. Withrow, master in chancery, executed on the 6th day of August, 1866, to the said Chicago, Rock Island and Pacific Railroad Company of Iowa, under a sale made in pursuance of the decree hereinbefore described, and recorded in the office of the recorder of deeds of the proper county, December 9th, 1867, and especially so much of said deed as describes the land in controversy.

To which defendant objected as immaterial. Objection overruled by the court. Defendant excepts.

Articles of consolidation entered into between the Chicago, Rock Island and Pacific Railroad Company of Illinois and the Chicago, Rock Island and Pacific Railroad Company of Iowa, whereby the companies were consolidated, and became the present plaintiff.

Act of the 12th general assembly of Iowa, approved February
38 11th, 1868, entitled "An act providing for and requiring the early construction of the Chicago, Rock Island and Pacific Railroad from Davenport to Council Bluffs, Iowa." (Chapter XIII, of the laws of the 12th general assembly.)

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Acceptance by the said railroad company of the terms and conditions of said act of February 11th, 1868.

To which defendant objected as immaterial. Objection overruled. Defendant excepts.

Certificate of governor of Iowa, dated Des Moines, December 31st, 1869, certifying to the completion of the road. (Exhibit No. 49 to petition.)

To which defendant objects as immaterial. Objection overruled. Defendant excepts.

Map showing the definitely located line through Shelby County, with the minutes of the surveyor showing the date of the location. This map shows the line as delineated on the two maps already set out herein, and also the line on which the road was located. Which route was filed January 11th, 1870, and which was the result of change of route, under act of June 2d, 1864, hereinbefore set out. It also shows the twenty-mile limit from such new route, as provided by said act of 1864, and shows that the land in controversy lies several miles outside said twenty-mile limit.

Plaintiff rests.

Defendant introduced the following evidence:

Act of Congress entitled "An act quieting the title to certain lands in the State of Iowa," which was presented to the President January 20th, 1873, and became a law January 31st, 1873, by reason of his failure to sign it or veto it. (Page 32, No. 48 of published acts of the 3d session of the 42d Congress.)

Act of Congress entitled "An act securing homesteads to actual settlers on the public domain." Approved May 20th, 1862. (12 U. S. Statutes at Large, page 392.)

GEO. W. GRINNELL:

I am the defendant. I am in the occupation of the land in controversy, and have been ever since about November 15th, 1872. I have a family consisting of a wife and one son now at home. In 1873 there were two children at home. I have broken 70 acres; I have a comfortable house and a yard stable; I have some hedge; I had out about one hundred fruit trees, some died, and I have quite a large number of maple trees. I built my house in 1872, and the other improvements have been made at various times since. I am a citizen of the United States. In June, 1873, I went to get my homestead papers and to pay for them, and expected to get them, not knowing that there was any reason why I should not. The local land officers rejected my application; that is, they would not receive it at all. They took the fee for filing a homestead application, but would not file it. I wished this land for a home. I had no other homestead. The line of the Chicago, Rock Island and Pacific Railroad Company where it is built and operated, runs about twenty-four or twenty-five miles south of my land, and that is the nearest point the road came to this land. The nearest point is at Walnut station, in Pottawattamie County.

Cross-examination:

I lived in Beloit, Wisconsin, and came directly from there to live on this land. I came in the cars. I had heard that there was some government land here that could be taken as a homestead. I think I had also heard that it had once been on the line of the railroad, but that the road was built so it was left out. I made no inquiries here about the land. At Des Moines they said they rejected my application because they said the land was not in market, because it had been certified to the railroad. In the fall of 1873, Mr. Van Tyle come to me and said he was hunting the railroad land. I think this was the first I knew about the railroad claiming it, except what I was told at Des Moines the June previous. Since I came from Des Moines I have been at work on the land. Never made any other application.

J. L. DREW:

I am land commissioner of the plaintiff. The road was completed to Council Bluffs in June, 1869. At the time of the foreclosure and

sale in evidence it was completed to Kellogg, in Jasper County, about one hundred and fifty miles east of here (Harlan). The present location of the road was adopted about 1870. The map of the new line was filed after the completion of the road. The new line does not touch Shelby County except at one station (Shelby). Walnut station is two or three miles south of the south line of Shelby County, in Pottawattamie.

41 Cross-examination:

It is one hundred and thirty miles from Davenport to Kellogg. The amount of land certified under the act of 1856, to Mississippi and Missouri Railroad Company was 388,220 acres.

Re-examination:

One hundred and sixty thousand acres more were certified under the act of 1864.

Recross-examination:

At the date of the act of June 2d, 1864, the road was completed one hundred and thirty miles west from Davenport to Kellogg.

Defendant rests.

The above and foregoing was all the evidence introduced in the trial of said cause. Whereupon the plaintiff filed a motion asking the court to instruct the jury to return a verdict in behalf of plaintiff, on the following grounds:

1. The evidence leaves only a question of law.
2. The evidence shows plaintiff entitled in law to recover.

On which said motion the court made a ruling sustaining the motion; to which defendant at the time excepted.

42 *Instruction.*

Whereupon the court verbally instructed the jury to return a verdict for plaintiff, which was accordingly done, and that was the only instruction given to the jury.

Whereupon, on the 3d day of April, 1878, the defendant filed a motion for a new trial, on the following grounds:

1. The verdict is contrary to the evidence, and not sustained thereby.
2. The verdict is contrary to the law.
3. The court erred in instructing the jury to find a verdict for the plaintiff.
4. The court erred in instructing the jury orally.

Which said motion the court on the same day overruled and entered judgment for the plaintiff, according it possession of the land, and ordering the necessary writ to issue to put it in such possession, and costs of suit; to which ruling and judgment, and to each of them, defendant at the time excepted, and by agreement of parties had sixty days within which to file bill of exceptions, which was done. And afterwards, and within the time allowed by law, defendant perfected his appeal to this court by filing herein a supercedias bond, and serving a
43 notice of appeal on the plaintiff's attorneys, and on the clerk of the court below.

CHICAGO, ROCK ISLAND AND PACIFIC RAILroad Co., appellee,
vs.
H. P. EMERY, APPELLANT. } No. 2.

Appeal from Audubon circuit court.

Pleading.

The pleadings and issues in this case are the same as those in the case of this plaintiff vs. George W. Grinnell, from Shelby circuit court, case No. 1 of this abstract, except the land in controversy is described as follows: N. ½ of SE. ¼, and NE. ¼ of SW. ¼ of section No. 28, township 80, range No. 35.

Bill of exceptions.

Upon this case being called for trial, at the April term, 1878, of said court, plaintiff introduced the same evidence as was introduced on the trial of the said case of plaintiff vs. George W. Grinnell, excepting that the proof would show in this case that the land in controversy is within six miles of the line of the Mississippi and Missouri Railroad, as shown on the map filed in the office of the Commissioner of the General Land Office April 1st, 1857, and also within the twelve-mile limit of the new line. The defendant's testimony as to occupation, citizenship, qualifications to enter the land as homesteads, and time of entry, is in substance the same as in said case vs. Grinnell. The same acts of Congress were introduced by defendant, and all the objections, rulings of the court, and exceptions are in the record of this case, and it is agreed that the abstract of that case shall be taken as the abstract of this except as to the differences pointed out herein, and that the bill of exceptions was filed in due time.

Judgment.

The judgment of the court in this case was the same as in the
44 said Grinnell case, and the same exception was taken thereto.

Notice of appeal.

In this case a supercedeas bond and notice of appeal to this court were filed in due time, served on the plaintiff's attorney, and clerk of the court below, and on the said notice of appeal was enclosed the consent of appellee that this case be brought to this court, sitting at Council Bluffs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILroad Co., appellee,
vs.
JAMES ROBINSON, APPELLANT. } No. 3.

Appeal from Audubon circuit court.

Pleading.

The pleadings and issues in this case are the same as those in the

case of this plaintiff vs. Geo. W. Grinnell, supra, except that the land in controversy is described as follows: The SE. ¼, section No. 17, township 80, range 35.

Bill of exceptions.

Upon the case being called for trial at the April term, 1878, of said court, it was agreed between the parties that the same record, so far as the plaintiff was concerned, should be treated as in evidence to sustain the issue on its part, as was introduced in the case of this plaintiff vs. Geo. W. Grinnell, supra, excepting that the proof would show in this case that the land in controversy is within the six miles limit of the line of the road, as shown upon the map filed April 1st, 1857. And the defendant's testimony as to occupation, citizenship, qualification to enter land as homestead, and time of entry, is, in substance, the same as that in said Grinnell case, and the same acts of Congress were introduced by defendant, and it was agreed by the parties in open court that all objections and exceptions of the record of the said Grinnell case shall
45 be treated as the record in this case, including the objections of the parties, rulings of the court, and exceptions thereto.

Judgment.

The judgment of the court in this case was the same as in the said Grinnell case, and the same exception was taken thereto, and the bill of exceptions was filed in due time.

Notice of appeal.

In this case a supercedeas bond and motion of appeal to this court, served on plaintiff's attorney and on the clerk of the court below, in due time were filed herein, and on said notice of appeal was endorsed the consent of appellee that this case be brought to this court, sitting at Council Bluffs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, appellee,
vs.
JOHN THARNISH, APPELLANT. } No. 4.

Appeal from Audubon circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said Grinnell case, except that the land in controversy is the NW. ¼ of section No. 28, township No. 80, range No. 35.

Bill of exceptions.

Upon this case being called for trial at the April term, 1878, the parties in open court stipulated that the evidence introduced by each party should be the same in all respects as that in the case of that plaint-
46 iff vs. H. P. Emery, supra, and that the record, judgment, including objections to evidence, rulings of the court, and exceptions of the parties should be the same as in said cause.

The judgment of the court in this case was the same as in the said Emery case, and the same exception was taken thereto, and the bill of exceptions filed in due time.

Notice of appeal.

In this case a supercedeas bond and notice of appeal to this court, served in due time as provided by law, were filed herein, and on said notice was endorsed the consent of appellee that this case be brought to this court, sitting at Council Bluffs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILroad Co., appellee,
vs.
MARY E. BRUCE, APPELLANT. } No. 5.

Appeal from Audubon circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said Grinnell case, except that the land in controversy is the SE. ¼ of section No. 29, township No. 81, range No. 34.

Bill of exceptions.

Upon the case being called for trial at the April term, 1878, it is stipulated by the parties in open court that the same should be treated as heard by the court, upon the same evidence upon the part of each party as that introduced on the trial of the said Grinnell case, and that
47 the same records, including objections to evidence, rulings of the court, and exceptions thereto by the parties, may be made.

Judgment.

The judgment of the court was the same in this case as in said Grinnell case, and the same exception was taken thereto and bill of exceptions filed in due time.

Notice of appeal.

A supercedeas bond and notice of appeal to this court, served in due time as provided by law, were filed herein, and on said notice was endorsed the consent of appellee that this cause be brought to this court sitting at Council Bluffs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILroad Co., appellee,
vs.
A. HAMMOND, APPELLANT. } No. 6.

Appeal from Audubon circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said Grinnell case, except that the land in controversy is the NE. ¼ of section No. 13, township No. 81, range No. 35.

Bill of exceptions.

Upon this case being called for trial at the April term, 1878, it is agreed by the parties in open court that the same should be treated as heard upon the same evidence upon the part of each party as the said Grinnell case, with the exception that in this case it would show that the defendant never made any application at the land office for
48 leave to enter the land in controversy as a homestead, and it is also agreed that the same record, including objections to evidence, rulings of the court, and the exceptions of parties, shall be made in this as in that case.

Judgment.

The judgment of the court was the same in this case as in said Grinnell case, and the same exception was taken thereto and bill of exceptions filed in due time.

Notice of appeal.

A supercedeas bond and notice of appeal to this court, served in due time as provided by law, were filed herein, and on said notice was endorsed the consent of appellee that this cause be brought to this court sitting at Council Bluffs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILroad Co., appellee,
vs.
S. E. OGBORN, APPELLANT. } No. 7.

Appeal from Audubon circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said Grinnell case, except that the land in controversy is the SW. ¼, section 17, township 81, range 35.

Bill of exceptions.

Upon this case being called for trial at the April term, 1878, it is agreed by the parties in open court that the same should be treated as heard upon the same evidence upon the part of each party as
49 that introduced in the said Grinnell case, except that it would appear that the defendant made no application for leave to enter the land as a homestead until in the winter of 1877. And it is also agreed that the same record, including objections to evidence, rulings of the court, and exceptions of the parties, may be made in this case as in that.

Judgment.

The judgment of the court in this case was the same as in the said Grinnell case, and the same exception was taken thereto, and a bill of exceptions was filed in due time.

Notice of appeal.

A supercedeus bond and notice of appeal to this court, served in due time as required by law, were filed herein, and on said notice was endorsed the consent of appellee that this cause be brought to this court sitting at Council Bluffs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILroad Co., appellee,
vs.
E. E. OGBORN, APPELLANT. } No. 8

Appeal from Audubon circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said Grinnell case, except that the land in controversy is the SE. ¼ of section 17, township 81, range 35.

Bill of exceptions.

Upon the case being called for trial at the April term, 1878, it was
50 stipulated by the parties in open court that the same may be treated as heard upon the same evidence as was introduced by each party upon the trial of the said Grinnell case, and that the same record, including objections, rulings of the court, and exceptions of the parties, may be made in this case as in that.

Judgment.

The judgment of the court in this case was the same as in the said Grinnell case, and the same exception was taken thereto, and a bill of exceptions was filed in due time.

Notice of appeal.

A supercedeus bond and notice of appeal to this court, served in due time as required by law, were filed herein, and on said notice was endorsed the consent of appellee that this cause be brought to this court sitting at Council Bluffs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILroad Co., appellee,
vs.
GEORGE ULRICH, APPELLANT. } No. 9.

Appeal from Audubon circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said Grinnell case, except that the land in controversy is the NE. ¼ section 27, township 81, range 36.

Bill of exceptions.

Upon this case being called for trial at the April term, 1878, it was agreed by the parties in open court that the same may be treated
51 as heard upon the same evidence as introduced by each party on the trial of the said Grinnel case, and that the same record, including objections to the evidence, rulings of the court, and the exceptions of parties, shall be made in this case as in that.

Judgment.

The judgment of the court in this case was the same as in the said Grinnell case, and the same exception was taken thereto, and a bill of exceptions was filed in due time.

Notice of appeal.

A supercedeas bond and notice of appeal to this court, served in due time as required by law, were filed herein, and on said notice was endorsed the consent of appellee that this cause be brought to this court sitting at Council Bluffs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILroad Co., appellee,
vs.
W. D. PACKARD, APPELLANT. } No. 10.

Appeal from Audubon circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said Grinnell case, except that the land in controversy is the SW. ¼ of section 1, township 81, range 36.

Bill of exceptions.

Upon the case being called for trial at the April term, 1878, it was stipulated by the parties in open court that the same may be
52 treated as heard upon the same evidence as that introduced by each party in the said Grinnell case, excepting the introduction in evidence of a deed to this plaintiff from the Chicago, Rock Island and Pacific Railroad Company, and that the same record, including objections, rulings of the court, and exceptions of the parties, may be made in this case as in that.

Judgment.

The judgment of the court in this case was the same as in the said Grinnell case, and the same exception was taken thereto, and a bill of exceptions was filed in due time.

Notice of appeal.

A supercedeas bond, and notice of appeal to this court, served in due time as required by law, were filed herein, and on said notice was en-

dorsed the consent of appellee that this cause be brought to this court sitting at Council Bluffs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILroad Co., appellee,
vs.
JOHN SLATER, APPELLANT. } No. 11.

Appeal from Crawford district court.

Pleadings.

The pleadings and issues in this case are the same as those in the said Grinnell case, except that the land in controversy is the NE. ¼ section 35, township 82, range 38.

Bill of exceptions.

Upon this case being called for trial at the April term, 1878, it was agreed by the parties in open court that the same may be treated as heard upon the same evidence as introduced by

53 *Bill of exceptions.*

Upon the case being called for trial at the April term, 1878, it was stipulated by the parties in open court, that the same may be treated as heard by the court, upon the same evidence upon the part of each party, as that introduced on the trial of the said Grinnell case, and that the same record, including objections to the evidence, rulings of the court, and the exceptions of parties, shall be made in this as in that case.

Judgment.

The judgment of the court in this case was the same as in the said Grinnell case, and the same exception was taken thereto, and a bill of exceptions was filed in due time.

Notice of appeal.

A supercedeas bond and notice of appeal to this court, served in due time as required by law, were filed herein, and on said notice was endorsed the consent of appellee that this cause be brought to this court sitting at Council Bluffs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILroad Co., appellee,
vs.
JACOB WEAKLINE, APPELLANT.

Appeal from Crawford district court.

Pleadings.

The pleadings and issues in this case are the same as those in the said Grinnell case, except that the land in controversy is the S. ½ of the SE. ¼ of section 33, township 82, range No. 38.

54 *Bill of exceptions.*

Upon this case being called for trial at the April term, 1878, it was agreed by the parties in open court, that the same may be treated as heard upon the same evidence as was introduced by each party upon the trial of the said Grinnell case, and that the same record, including objections, rulings of the court, and exceptions of the parties, may be made in this case as in that.

Judgment.

The judgment of the court in this case was the same as in the said Grinnell case, and the same exception was taken thereto and a bill of exceptions was filed in due time.

Notice of appeal.

A supercedeus bond and notice of appeal to this court, served in due time as required by law, were filed herein, and on said notice was endorsed the consent of appellee that this cause be brought to this court, sitting at Council Bluffs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILroad Co., appellee,
vs.
LYDIA DUNHAM, APPELLANT. } No. 13.

Appeal from Crawford circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said Grinnell case, except that the land in controversy is the SW. ¼, section 35, township 82, range 38.

55 *Bill of exceptions.*

Upon this case being called for trial at the April term, 1878, it was agreed by the parties in open court that the same may be treated as heard upon the same evidence as was introduced by each party on the trial of the said Grinnell case, and that the same record, including objections to evidence, rulings of the court, and exceptions of the parties, may be made in this case as in that.

Judgment.

The judgment of the court was the same in this case as in the said Grinnell case, and the same exception was taken thereto, and a bill of exceptions was filed in due time.

Notice of appeal.

A supercedeus bond and notice of appeal to this court, served in due time as required by law, were filed herein.

Stipulation.

It is agreed that the foregoing thirteen cases may be submitted to the supreme court on this consolidated abstract, and the same may be docketed in said court as one case.

56 *Assignment of errors.*

The following errors appear of record:

1. The court erred in overruling defendant's objections to exhibit number 1. Abstract, page 25.
2. The court erred in overruling defendant's objections to exhibit number 3. Abstract, page 25.
3. The court erred in overruling defendant's objections to exhibit number 4. Abstract, page 26.
4. The court erred in overruling defendant's objections to exhibit number 5. Abstract, page 26.
5. The court erred in overruling defendant's objection to exhibit number 6. Abstract, page 26.
6. The court erred in overruling defendant's objection to exhibit number 7. Abstract, page 26.
7. The court erred in overruling defendant's objections to act of general assembly of State of Iowa, of July 14th, 1856. Abstract, page 27.
8. The court erred in overruling defendant's objection to exhibit number 9. Abstract, page 27.
9. The court erred in overruling defendant's objection to exhibit number 10. Abstract, page 27.
10. The court erred in overruling defendant's objections to exhibit number 11. Abstract, page 28.
11. The court erred in overruling defendant's objections to exhibit number 12. Abstract, page 28.

57 12. The court erred in overruling defendant's objections to exhibit number 14. Abstract, page 28.

13. The court erred in overruling defendant's objections to exhibit number 16. Abstract, page 29.
14. The court erred in overruling defendant's objections to exhibit number 17. Abstract, page 29.
15. The court erred in overruling defendant's objections to exhibit number 18. Abstract, page 29.
16. The court erred in overruling defendant's objections to exhibit number 21. Abstract, page 29.
17. The court erred in overruling defendant's objections to exhibit number 23. Abstract, page 30.
18. The court erred in overruling defendant's objections to exhibit number 24. Abstract, page 30.
19. The court erred in overruling defendant's objections to exhibit number 25. Abstract, page 30.
20. The court erred in overruling defendant's objections to exhibit number 26. Abstract, page 30.
21. The court erred in overruling defendant's objections to exhibit number 29. Abstract, page 31.
22. The court erred in overruling defendant's objections to exhibit number 32. Abstract, page 31.
23. The court erred in overruling defendant's objections to exhibit number 33. Abstract, page 31.

24. The court erred in overruling defendant's objections to exhibit number 35. Abstract, page 31.

58 25. The court erred in overruling defendant's objections to supplemental map. Abstract, page 32.

26. The court erred in overruling defendant's objections to deed of trust. Abstract, page 35.

27. The court erred in overruling defendant's objections to second deed of trust or mortgage. Abstract, page 36.

28. The court erred in overruling defendant's objections to decree of United States C. C. Abstract, page 37.

29. The court erred in overruling defendant's objections to master's deed. Abstract, page 37.

30. The court erred in overruling defendant's objections to act of 12th general assembly of Iowa. Abstract, page 38.

31. The court erred in overruling defendant's objections to acceptance of railroad company. Abstract, page 38.

32. The court erred in overruling defendant's objections to certificate of governor. Abstract, page 38.

33. The court erred in instructing jury to return verdict for plaintiff. Abstract, page 41.

34. The court erred in overruling the motion of defendant for a new trial. Abstract, page 42.

35. The court erred in overruling said motion because the verdict is contrary to evidence. Abstract, page 42.

35. The court erred in overruling said motion because the same is contrary to law. Abstract, page 42.

36. The court erred in instructing the jury orally. Abstract, page 42.

37. The court erred in rendering judgment for plaintiff. Abstract, page 42.

59 And afterwards, to wit, on the 17th day of September, 1878, the following amendment to said abstract was filed in the office of said clerk of the supreme court of Iowa:

60 *Amendment to abstract.*

In the supreme court of Iowa, September term, 1878.

THE C., R. I. & P. R. R. CO., APPELLEE,
vs.
GEO. W. GRINNELL, APPELLANT. } At law.

And twelve other cases.

Appeal from Shelby, Audubon, and Crawford Counties.

Sapp, Lyman & Ament, attorneys for appellant.
Wright, Gatch & Wright, attorneys for appellee.

61 By agreement of parties the following amendment is made to the appellant's abstract of record filed herein:

Title of cases.—On page 2, case No. 9, appellant's name should read "Ulrich" instead of "Ulnile." On page 51, case No. 10, appellee should be "Charles Stewart" instead of "C., R. I. & P. R. R. Co."

Page 28, Exhibit No. 11.—This map shows the line of the Mississippi and Missouri Railroad as definitely located on the ground through

Shelby County, and shows the land in controversy to be within 15 miles thereof, and is the same map referred to in Exhibit No. 17.

Page 32, Exhibit No. 36.—This map is the one referred to in Exhibit No. 35; is substantially the same as Exhibit No. 11; meets the suggestion contained in Exhibit No. 17, and shows the land in controversy to be within 15 miles of the line therein laid down.

Page 38, map.—Strike out the word "located," at the beginning of the fifth line of the description of the map, and in lieu thereof insert words "finally built west of Kellogg." Also strike out the word "route" in same line, and insert the word "map" in lieu thereof.

Page 41, ruling.—"Motion of plaintiff to direct verdict for plaintiff sustained."

Page 42, instruction and verdict.—The court prepared a written verdict for the jury to sign, which he handed to one of the
62 jurors, with verbal direction to sign the same.

Page 43, bill of exceptions.—Read "twenty," instead of "twelve."
Page 44, case No. 2.—There is no supercedeas bond in this case.
Page 47, case No. 5.—There is no supercedeas bond in this case.
Page 48, case No. 6.—There is no supercedeas bond in this case.
Page 51, case No. 9.—There is no supercedeas bond in this case.
Page 52, case No. 10.—There is no supercedeas bond in this case.

63 And on the 29th day of November, 1879, the appellant filed his additional and supplemental abstract of record in words and figures as follows, to wit:

64 *Appellant's additional and supplemental abstract of record.*

In the supreme court of Iowa, December term, 1878.

THE C., R. I. & P. R. R. CO., APPELLEE,
vs.
GEO. W. GRINNELL, APPELLANT. } At law.

And other cases.

Appeals from Shelby, Audubon, and Crawford Counties.

Sapp, Lyman & Ament, attorneys for appellant.
Wirght, Gatch & Wright, attorneys for appellee.

65 *Stipulation.*

It is stipulated and agreed, by and between the parties in the cases hereinafter named, numbered 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24, that the same shall be submitted to the supreme court of Iowa, at Des Moines, Iowa, at the same time and with the above named case of the C., R. I. & P. R. R. Co. vs. Geo. W. Grinnell and twelve other cases, upon the same record as those cases except as modified herein; also upon the same arguments, and as a part of said case. The following are the cases referred to in the foregoing statement, together with the modifications of record therein:

C., R. I. & P. R. R. Co., APPELLEE,
vs.
ANDREW WILFONG, APPELLANT. } No. 14.

Appeal from Shelby circuit court.

Pleadings.

The pleadings and issues in this case are the same as in the said case vs. Geo. W. Grinnell, except the land in controversy is the NW. ¼ of section No. 3, township No. 81, range 37, in Shelby County, Iowa.

Bill of exceptions.

This case was tried at the October term, 1878, of said Shelby circuit court, and the evidence on the part of plaintiff was the same as that in the said Grinnell case; also the evidence on the part of the defendant, except as to settlement and occupation, which was as follows:

ANDREW WILFONG, the defendant, testified as follows:

66 I have resided on the land in controversy since November, 1872, constantly. Was twenty-one years of age, and a citizen of the United States when I settled on the land, and have never borne arms against the United States. I am the head of a family. Have put a house, stable, and granary thereon, broken seventy acres, and put out some fruit and forest trees. In 1873, I applied at the local land office to file homestead claim, and was refused.

Cross-examination:

I lived in Tama County before moving on this land, and moved from there onto the land. I made inquiry at the recorder's office in Harlan as to the title to the land. The recorder said it was not recorded to anybody. I heard that there was a strip of land through there that went back to the government on account of the railroad company changing its line. Heard that they had claimed the land. I also inquired at D. M. Wyland's office. Heard in Tama County that the railroad company had given up the land. I don't mean I heard they had said they did not claim it, but I mean that I understood they had lost their claim by a change in the route of the road. I applied to the land office through A. L. Bell. He said the application was filed and rejected. I do not remember that he stated the reason. I understood the land office was not open to receiving homestead applications on this land, or for its disposal. I understood the lands were in dispute between the railroad company and the settlers. Mr. Wyland told me they were in dispute when I first spoke to him.

Redirect:

Wyland said he was agent for the company. He said he was selling land, but would not give a warranty deed for any land outside the twenty mile limit, but would give a quitclaim deed.

67 In rebuttal.

DAVID WYLAND was called by plaintiff, who testified as follows:

I was, in 1872, authorized to receive applications for railroad lands, and to send same to railroad company. I had several conversations with

Mr. Wilford. If I said anything to him about titles I told him the company would give him the same deed to lands outside the twenty mile limits as within. I never said the company would not give a warranty deed for lands outside the twenty mile limit, and the company gave warranty deeds.

Cross-examination:

The company were not selling lands claimed to be included in the swamp land grant.

The above and foregoing is all the testimony introduced on said trial. The same objections, rulings and exceptions were made and taken as in said Grinnell case, also the same judgment was rendered, after overruling the same motion for a new trial. Sixty days was given defendant to file bill of exception, by consent of parties, which was done in due time.

Notice of appeal.

Within the time allowed by law, defendant filed herein a notice of appeal to this court, duly served on the plaintiff and the clerk of said circuit court, and on which was the written consent of plaintiff that this case be brought to this court setting at Des Moines.

SAME APPELLEE
vs.
ED. PENNISTON, APPELLANT. } No. 15.

Appeal from Shelby circuit court.

68 *Pleadings.*

The pleadings and issues in this case are the same as in the said case vs. Geo. W. Grinnell, except the land in controversy is the S. ½ of N.W. , and N. ½ of S.W. , of sect. No. 7, township No. 81, range 38, in Shelby County, Iowa.

Bill of exception.

This case was tried at the October term, 1878, of the Shelby County circuit court, and the evidence on the part of both plaintiff and defendant was substantially the same as in the saidGrinnell case. The same objections, rulings, and exceptions were made and taken as in said Grinnell case. The same judgment was rendered after overruling the same motion for a new trial. Sixty days was given defendant to file bill of exception, by consent of parties, which was done in due time.

Notice of appeal.

Within the time allowed by law, defendant filed herein a notice of appeal to this court, duly served on the plaintiff and the clerk of said circuit court, and on which was the written consent of plaintiff that this case be brought to this court sitting at Des Moines.

SAME APPELLEE
vs.
GEO. DARLING, APPELLANT. } No. 16.

Appeal from Shelby circuit court.

Pleadings.

The pleadings and issues in this case are the same as in the
69 said case vs. Geo. W. Grinnell, except the land in controversy is the NE. ¼ of section No. 21. township No. 81, range 37, in Shelby County, Iowa.

Bill of exceptions.

This case was tried at the October term, 1878, of said Shelby circuit court, and the evidence on the part of plaintiff was the same as that in the said Grinnell case. The same objections, rulings, and exceptions were made as in the said Grinnell case. The same judgment was rendered after overruling the same motion for a new trial. Sixty days was given defendant by consent of parties to file bill of exceptions, which was done in due time.

Notice of appeal.

Within the time allowed by law, defendant filed a motion of appeal to this court, duly served on the plaintiff and clerk of the said circuit court, and on which was the written consent of the plaintiff that this case be brought to this court sitting at Des Moines.

SAME APPELLEE
vs.
ANDREW L. BELL, APPELLANT. } No. 17.

Appeal from Shelby circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said case vs. Geo. W. Grinnell, except the land in controversy is the S. ½ of NW. ¼, and the N. ½ of SW. ¼, section No. 15, township No. 81, range No. 37, in Shelby County, Iowa.

Bill of exceptions.

70 This case was tried at the October term, 1878, of the Shelby circuit court, and the evidence on the part of both plaintiff and defendant was substantially the same as in the said Grinnell case. The same objections, rulings, and exceptions were made and taken as in the said Grinnell case. The same judgment was rendered after overruling the same motion for a new trial. Sixty days was given defendant, by consent of parties, to file bill of exceptions, which was done in due time.

Notice of appeal.

Within the time allowed by law, defendant filed a notice of appeal to

this court, duly served on the plaintiff and the clerk of the said circuit court, and on which was the written consent of the plaintiff that this case be brought to this court sitting at Des Moines.

SAME APPELLEE
vs.
CHARLES BROWN, APPELLANT. } No. 18.

Appeal from Shelby circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said case vs. Geo. W. Grinnell, except the land in controversy is the NE. ¼ of NW. ¼ and the N. ½ of the NE. ¼ of section No. 4, and the NW. ¼ of the NW. ¼ of section No. 3, all in township No. 81, range No. 38, in Shelby County, Iowa.

Bill of exceptions.

This case was tried at the October term, 1878, of the Shelby circuit court, and the evidence on the part of both plaintiff and defendant was substantially the same as in the said Grinnell case. The same objections, rulings, and exceptions were made and taken as in said Grinnell case. The same judgment was rendered after overruling the same motion for a new trial. Sixty days was given defendant, by consent of parties, to file bill of exceptions, which was done in due time.

71 *Notice of appeal.*

Within the time allowed by law, defendant filed a notice of appeal to this court, duly served on the plaintiff and clerk of the said circuit court, and on which was the written consent of the plaintiff that this case be brought to this court sitting at Des Moines.

SAME APPELLEE
vs.
EBENEZER TREFREY, APPELLANT. } No. 19.

Appeal from Shelby circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said case vs. Geo. W. Grinnell, except the land in controversy is the S. ½ of the NW. ¼ and the N. ½ of the SW. ¼ of section 25, township 81, range 39, in Shelby County, Iowa.

Bill of exceptions.

This case was tried at the October term, 1878, of the Shelby circuit court, and the evidence on the part of both plaintiff and defendant was substantially the same as the case vs. H. P. Emery (case No. 2, page 43, of the original abstract herein), the land in controversy being within the twenty mile limits, under the grant of 1864, and outside the six-mile limit from the old line of the road, except that defendant offers no

evidence as to his citizenship, and plaintiff offers the following evidence on that point:

THOS. S. WRIGHT:

In 1873 or 1874 this defendant and others had a controversy in relation to these lands before the register and receiver of the land-office at Des Moines; and defendant then testified in relation to his
72 settlement on the land in controversy. I was present and heard his testimony, and he said he was foreign born, and had never been naturalized; and my present recollection is that he said he had never made application for first papers.

H. C. HOLCOMB:

I am deputy clerk of Shelby County, and have been conversant with the record since October, 1877, and there is no record of the naturalization of Ebenezer Trefrey, that I have ever seen; and the current report among his neighbors is that he is an alien.

The same judgment was rendered after overruling the same motion for a new trial as in the said Emery case. The same objections, rulings and exceptions were made and taken. By consent of parties, sixty days was given to file bill of exception, which was done in due time.

Notice of appeal.

Within the time allowed by law, defendant filed a notice of appeal to this court, duly served on the plaintiff and the clerk of the said circuit court, and on which was the written consent of the plaintiff that this case be brought to this court sitting at Des Moines.

SAME APPELLEE
vs.
VIOLETTA ROPER, APPELLANT. } No. 20.

Appeal from Shelby circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said case vs. Geo. W. Grinnell, except the land in controversy is the S. ½ of the SE. ¼ of section No. 25, township No. 81, range No. 39, in Shelby County, Iowa.

73 *Bill of exceptions.*

This case was tried at the October term, 1878, of the Shelby circuit court, and the evidence on the part of both plaintiff and defendant was substantially the same as that in the said case vs. H. P. Emery, the land in controversy being within the twenty-mile limit under the grant of 1864, and outside the six-mile limit from the old line of the road. The same objections, rulings, and exceptions were made and taken as in the said Emery case. The same judgment was rendered after overruling the same motion for a new trial. Sixty days was given defendant by consent of parties to file bill of exceptions, which was done in due time.

Notice of appeal.

Within the time allowed by law defendant filed a notice of appeal to this court, duly served on the plaintiff and clerk of the said circuit court, and on which was the written consent of the plaintiff that this case be brought to this court sitting at Des Moines.

SAME APPELLEE
vs.
BENJ. H. LATHROP, APPELLANT. } No. 21.

Appeal from Shelby circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said case vs. Geo. W. Grinnell, except the land in controversy is the NE. ¼ of section No. 3, township No. 81, range No. 37, in Shelby County, Iowa.

Bill of exceptions.

This case was tried at the October term, 1878, of the Shelby
74 circuit court, and the evidence on the part of both plaintiff and defendant was substantially the same as in the case vs. Geo. W. Grinnell. The same objections, rulings, and exceptions were made and taken as in said Grinnell case. The same judgment was rendered after overruling the same motion for a new trial. Sixty days was given defendant, by consent of parties, to file bill of exceptions, which was done in due time.

Notice of appeal.

Within the time allowed by law defendant filed herein a notice of appeal to this court, duly served on the plaintiff and the clerk of said circuit court, and on which was the written consent of plaintiff that this case be brought to this court sitting at Des Moines.

JOSEPH TOMLINSON, APPELLEE,
vs.
JOHN BRUCE, APPELLANT. } No. 22.

Appeal from Audubon circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said case vs. Geo. W. Grinnell, except the land in controversy is the SE. ¼ of section 7, township 81, range 34, in Audubon County. And in addition plaintiff pleads as part of its chain of title a deed from C., R. I. & P. R. R. Co. to him for the land, and a judgment of the district court of Shelby County, Iowa, rendered August 17, 1876, in an action of right for the same land between the same parties.

Bill of exceptions.

This case was tried at the October term, 1878, of the Audubon County

circuit court, and the evidence on the part of both plaintiff and
75 defendant was substantially the same as in the said Grinnell case, except the additional evidence hereafter set out. The same objections, rulings, and exceptions were made and taken as in said Grinnell case. The same judgment was rendered after overruling the same motion for a new trrial. Sixty days was given defendant, by consent of parties, to file bill of exceptions, which was done in due time.

Deed from the C., R. I. & P. R. R. Co. to the plaintiff, Joseph Tomlinson, for land in controversy.

Judgment entry, book A, page 480, district court records of Audubon County, in case between same parties, as follows * * * *: "We, the jury, find for the plaintiff, and that he is the owner and entitled to the immediate possession of the SE. ¼ of section 7, township 81, range 34. * * * * And thereupon, defendant having filed his motion in arrest of judgment and for a new trial, said cause came on further to be heard on said motion, and thereupon the same was by the court overruled, to which defendant at the time excepted; and thereupon plaintiff demanded judgment upon said verdict. It is ordered and adjudged and decreed that plaintiff is, and at the date of the commencement of this action was, the absolute owner in fee simple of the SE. ¼ of section 7, township 81, range 34 (here follows judgment for costs), and that the proper writ issue for the enforcement of this judgment and putting plaintiff in possession of said real estate; to all of which defendant at the time excepted, and by consent of parties in open court defendant has forty days from date of this judgment in which to file bill of exceptions."

Notice of appeal of said cause to the June term, 1877, of the supreme court of Iowa.

76 Proceedendo of the supreme court announcing the affirmance of said judgment on motion of appellee, dated October 16, 1877.

Writ of possession, dated October 19th, 1877.

Return of sheriff, showing service of said writ by taking possession of the real estate and unsatisfied as to costs.

Notice of appeal.

Within the time allowed by law defendant filed a notice of appeal to this court, duly served on the plaintiff and the clerk of said circuit court.

SAME APPELLEE
vs.
S. B. S. DUNCAN, APPELLANT. } No. 23.

Appeal from Audubon circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said case vs. John Bruce, except the land in controversy is the SW. ¼ of section 7, township 81, range 34, in Audubon County, Iowa.

Bill of exceptions.

This case was tried at the October term, 1878, of the Audubon County circuit court, and the evidence on the part of both plaintiff and

77 defendant was substially the same as in the said Bruce case. The same objections, rulings, and exceptions were made and taken as in the said Bruce case. The same judgment was rendered after overruling the same motion for a new trial. Sixty days was given defendant, by consent of parties, to file bill of exceptions, which was done in due time.

Notice of appeal.

Within the time allowed by law defendant filed a notice of appeal to this court duly served on the plaintiff and clerk of the said circuit court.

SAME APPELLEE
vs.
WM. BRUCE, APPELLANT. } No. 24.

Appeal from Audubon circuit court.

Pleadings.

The pleadings and issues in this case are the same as those in the said case vs. John Bruce, except the land in controversy is the W. ½ of NE. ¼ section 7, township No. 81, range 34, in Audubon County, Iowa.

This case was tried at the October term, 1878, of the Shelby circuit court, and the evidence on the part of both plaintiff and defendant was substantially the same as in the said John Bruce case. The same objections, rulings, and exceptions were made and taken as in said John Bruce case. The same judgment was rendered after overruling the same motion for a new trial. Sixty days was given defendant, by consent of parties, to file bill of exceptions, which was done in due time.

Notice of appeal.

78 Within the time allowed by law defendant filed a notice of appeal to this court, duly served on the plaintiff and the clerk of the said circuit court.

Second amendment to original abstract.

The appellants make the following amendments to the original abstract herein:

I. Add to the description of "certified lists of lands," on page 35 of the abstract, the following, to wit:

The said certificate of the Commissioner of the General Land Office, attached to said list, states that the selections are "in lieu of land in the alternate sections designated by odd numbers within said six sections in width on each side of said road, which the United States had legally sold, or to which the right of pre-emption had legally attached prior to the period at which the right of the State insured under said grant."

II. Add to exhibit number 36 (abstract page 32, amendment to abstract page 2), the following, to wit:

The survey of the line of road, of which this is a map, was commenced October 21st, 1856.

III. Add to bill of exception in case number 2, abstract page 43, and case number 4, abstract page 45, the following:

"Said land was certified to plaintiff on the list dated in 1870, certifying the even numbered sections, under act of 1864, within twenty miles limit, the only certified list under that act."

IV. The defendants have never borne arms against the United States. The land officers rejected their homestead application because the lands were claimed by the R. R. company.

79 And on the 14th day of June, 1879, the said court filed their written opinion in said cause, in words and figures as follows, to wit:

80 Supreme court. June term, 1879.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILroad Co.
vs.
GEORGE W. GRINNELL, APPELLANT.

Appeal from Shelby circuit court.

Action at law to recover the possession of a quarter section of land situated in Shelby County. There was a verdict and judgment for pl't'ff; def't appeals. The facts of the case fully appears in the opinion.

Sapp, Lyman & Ament, for appellants.

Thomas F. Withrow, Wright, Gatch & Wright, for appellee.

BECK, *Ch. J.*

I. The leading questions of law involved in this case are important, and not without difficulty in their solution, and one of them at least has never before been passed upon by the courts. The case has been argued before us by counsel on both sides with great ability, and with that
81 thoroughness and clearness which manifest extensive research and complete familiarity with the law and the facts involved in the case. It is, indeed, the good fortune of this court to have so important a case presented in this thorough and able manner. Many questions are discussed by counsel which, in the view we take of the case, are unimportant. They will not, therefore, be considered in this opinion.

II. The cause was submitted to the jury upon an instruction directing them to return a verdict for plaintiff, on the ground that the evidence showed the title of the land in controversy to be in plaintiff. Many errors are assigned, relating to rulings upon the admission of testimony, &c. These objections relate to the very right of plaintiff to recover, and assail its title to the land. Counsel for def't do not discuss their assignment of errors point by point, but more correctly consider the case upon the facts disclosed in the record, and thereon maintain that plaintiff has failed to establish title to the land. We will discuss the case in the same manner.

The control'ing facts of the case which it becomes necessary to
82 consider are as follows:

The land in controversy is claimed by pl't'ff under a grant made by Congress to the State to aid in building a railroad from Davenport to Council Bluffs, and a grant made by the State to the corporation under which pl't'ff claims for the purpose of carrying out the object of the Congressional grant. The issues of the case require us to determine whether the land in controversy is covered by these grants, and

whether the title passed thereby and by assurances executed under the grants.

The Congressional grant was by the act of May 15th, 1856. The parts of this act which we are called upon to interpret are as follows:

"SECT. 1. That there be and is hereby granted to the State of Iowa, for the purpose of aiding in the construction of railroads" (four roads are named, among others the railroad from Davenport to Council Bluffs), "every alternate section of land designated by odd numbers, for six sections in width on each side of said roads. But in case it shall appear that the United States have, when the lines or routes of said roads
83 are definitely fixed, sold any sections or any parts thereof, granted as aforesaid, or the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid, which lands thus selected in lieu of those sold and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections, and odd numbers as aforesaid, and appropriated as aforesaid, shall be held by the State of Iowa for the use and purpose aforesaid: Provided, That the land to be so located shall in no case be further than fifteen miles from the line of said roads, and selected for and on account of said roads severally shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be dis-
84 posed of only as the work progresses, and the same shall be applied to no other purpose whatsoever.

"And provided further, That any and all lands heretofore reserved to the United States by an act of Congress, or in any other manner by competent authority for the purpose of aiding in any objects of internal improvements, or for any other purpose whatsoever, be and the same are hereby reserved from the operations of this act except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

"SECT. 3. And be it further enacted, that the said lands hereby granted to the said State shall be subject to the disposal of the legislature thereof for the purpose aforesaid and no other; and the said railroad shall be and remain public highway for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

85 "SEC. 4. And be it further enacted, That the lands hereby granted to said State shall be disposed of by said State only in manner following: That is to say, that a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold, and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be sold, and so from time to time until said roads are completed, and if

any of said roads are not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States."

The State by the act of July 14th, 1856, accepted the grant of Congress and regranted and conferred the lands appropriated to aid in building a railroad from Davenport to Council Bluffs to and upon
86 the Mississippi and Missouri Railroad Company. We may have occasion hereafter to refer to the provisions of this act and of an act supplemental thereto approved January 28th, 1857.

The Mississippi and Missouri Railroad Company filed in the General Land Office at Washington, on the 11th day of September, 1856, a map showing the proposed line of its road. A supplemental and corrected map was filed April 1st, 1857, showing substantially the same route as the original or first map, and correcting certain defects therein.

On the 4th day of September, 1856, Bernhart Henn, under authority and as agent of the Mississippi & Missouri Railroad Company, selected the unsold lands in the sections and parts of sections, designated by odd numbers, between the six and fifteen mile limits of the road, to make up the deficiency of the grant caused by sales and pre-emptions. The Commissioner of the General Land Office was advised of this selection by a letter of Mr. Henn.

The lands enuring under this grant were certified to the State by the Commissioner of the General Land Office December 27th, 1858.

87 The railroad was completed from Davenport to Kellogg, a distance of 130 miles, in 1864, upon the route as indicated in the maps above mentioned. By act of Congress approved June 2nd, 1864, Mississippi and Missouri Railroad Company was authorized to "modify & change the location of the uncompleted portion of its line, as shown by the maps thereof, * * * * so as to secure a better and more expeditious line for connection with the Iowa branch of the Union Pacific Railroad." The second section of the act is as follows:

"SEC. 2. And be it further enacted, That whenever such new location shall have been established, the said railroad company shall file in the General Land Office at Washington a map definitely showing such new location; and the Secretary of the Interior shall cause to be certified and conveyed to said company, from time to time, as the road progresses, out of any public lands now belonging to the United States not sold, reserved, or otherwise disposed of, or to which a pre-emption claim or right of homestead settlement has not attached, and on which a bona fide settlement and improvement has not been made under
88 color of title derived from the United States or from the State of Iowa, within six miles of such newly-located line, an amount of land per mile equal to that originally authorized to be granted to aid in the construction of said road by the act to which this is an amendment; and if the amount of land granted by the original act to aid in the construction of said railroad shall not be found within the limit of six miles from such line, then such selections may be made along such line within twenty miles thereof: Provided, That the said company shall not be entitled to, and shall not receive, any land under this grant which is situate within fifteen miles of the line of the Burlington & Missouri River Railroad, as indicated by the map of said road now on file in the General Land Office."

The plaintiff in 1866 became the purchaser of the railroad and all the title and interest of the Mississippi & Missouri Railroad Company to and in the lands granted by the legislation above recited upon the foreclosure of a mortgage executed by the last-named corporation
89 under authority conferred by an act of the legislature.

The plaintiff availed itself of the privilege of changing its route granted by the foregoing act and located its road on a new line so far south of the old line that the twenty-mile limits of the later act do not reach as far as the fifteen-mile limits of the first grant, leaving a strip of land between the respective limits which, at some points, is five miles in width. The lands in controversy are within the fifteen-mile limits of the old line.

The railroad was completed to Council Bluffs June 6th, 1869, and a map showing the new and old line was filed in the proper office in January, 1870. The def't in 1872 settled upon the land in controversy intending to acquire and occupy it as a homestead under the laws of the United States. He made applications as required by the homestead laws which he sought to file in the land office, but was refused.

III. We are first required to determine the force and effect of the original grant to the State under the act of Congress of May 15th, 1856.

The act, it is conceded by counsel of both parties, operates as
90 a grant in presenti and attached to lands when designated according to the provisions of the statute as the subject of the grant. Upon this proposition there is no dispute. In what manner does the act provide for the designation of the lands so that grant will attach? The lands within the six-mile limit are designated as being those of odd numbers on each side of the road; the deficiency lands are to be selected. When the statute was enacted the railroad had no existence. The object of the grant was to aid in the construction of a road in contemplation, to aid in creating such a railroad. It was well understood by Congress that the building of railroads, like all other great enterprises, required forethought and preparation by the adoption of plans as to the character and extent of the work and the means for accomplishing it. Indeed, the act itself exhibits such forethought and preparation in designating the termini of the road and in making the grant in order to provide means for the accomplishment of the enterprise. It was therefore well understood by Congress that before the railroad would
91 or could be constructed a route must be surveyed and adopted. It could not have been expected that so great a work would be prosecuted without fixed plans and designs as to the course and line of the road. Congress well knew that the line of the railroad would be surveyed and adopted by the State or by the persons natural or artificial that should undertake to construct it. The survey of the route and the location of the line of the railroad is a part of the work of construction; these are the beginning of the work, it is true, but are nevertheless a part of the work, and a very important part. They demand great skill and wisdom and very considerable outlay of money; of necessity they are, as we have said, the first work to be done. When done the route or line of the road is fixed, definitely fixed. The railroad has then assumed a form and an existence, as an embryo, it is true, but nevertheless an existence of the character that is at the beginning of all things which do not spring up complete by the magic of a word or a single act. The line surveyed and adopted, is just as definitely fixed, as permanently located as it is after the road is built. In either case it
92 may be changed by the exercise of the will of those having control of the road. In the exercise of that will the line of the road when the survey is adopted may be changed before the work is commenced, so it may be changed at any time afterward even when the road is fully completed and in operation. The effect of a change in one case is not different from a change in the other. In neither case would

the fact of the change lead to the conclusion that the railroad had not been definitely located by the survey first adopted. It is true that it may not be said to be permanently located, for nothing that depends upon the changeable will of man is permanent. The pl't'ff's railroad to-day cannot be said to be permanently unchangeably located except as to the points fixed by the statutes under which it received the grant of lands. If the interest of trade requires changes at particular points they may be made. The line of the road to-day, however, is definitely fixed—unmistakably locacated, but no more definitely fixed than when the survey was first made and adopted. We conclude, therefore,
93 that the survey and location of pl't'ff' railroad, and the filing of a map thereof in the proper office designated the lands within the six-mile limits to which the grant at once attached. So the selection outside of these limits and within fifteen miles of the road in the manner prescribed by the act designated the deficiency lands and they passed under the grant. These views are supported by the following cases: Leissieur vs. Price, 12 How., 59; Hicks vs. Hughes, 15 Wall., 123; Schulenberg vs. Harrimon, 21 Wall., 44; Railroad Co. vs. Courtright, 21 Wal., 310.

Another thought will support our conclusion. The grant was made to aid in the construction of the railroad. It is a matter of history that such enterprises are largely carried forward by the sale of bonds secured upon the property of the corporations building the roads. It was doubtless the expectation of Congress that the plaintiffs' railroad would be built in the usual manner. Unless the grant attached to the lands before the road was completed, it is difficult to see how the company could raise money in the ordinary manner by bonds
94 and mortgages. It is reasonable that these considerations had due influence in determining the conditions of the grant.

IV. The grant having attached upon the line of the road being definitely fixed, and the indemnity lands being duly selected, the company to whom the State transferred the property, acquired a valid and certain interest in the identical lands designated by such location of the road and selection. This interest and title, it is true, was conditional, depending upon the completion of the railroad, but could not have been defeated except for non-performance of that condition. It was held by the Mississippi & Missouri Railroad Company under the grant of the State, as all other property of which it could not have been deprived by legislation, either State or national. But in our opinion the act of June 2d, 1864, authorizing a change in the line of the railroad was not an attempt to do this. The language of the act does not express such intention which courts will not infer by construction. We will never presume vested rights are assailed by legislation. The language
95 of the legislature must be plain and explicit to authorize such a conclusion. It is not written our duty in this case to consider the construction and effect of this statute, further than to hold that it does not divert the grant under which the title to the lands in question vested.

The act of the legislature of the State conferring these lands upon the Mississippi and Missouri Railroad Company authorized that company to execute mortgages upon the property. Pl't'ffs' title is lawfully acquired under the foreclosure of a mortgage executed in pursuance of this authority. Subsequent legislation of the State recognized pl't'ffs' title to the lands. It has been recognized in a like manner by Congressional legislation. The courts must regard it valid under the principles and for the reasons we have attempted to present.

Def'ts' settlement and claims under the homestead laws of the United States having been made after the title to the land had passed from the government and vested in pl't'ff are void and cannot protect def'ts' possession.

V. Two or three objections urged by def'ts' counsel demand consideration.

96 It is said that the selection of the indemnity lands was prematurely made by one who had not been appointed by the State as an agent for that purpose. Let this be admitted. But both the State and Federal Governments have recognized the selections made, and certified the lands covered thereby as within the grant. The original parties to the grant, the grantee of the State, and the plaintiff who succeeded to its rights, have all for more than twenty years acquiesced in the selection of the lands. They are each surely bound thereby. It is not competent for a mere stranger to assail the title on this ground.

VI. The railroad was not completed within the time limited by Congressional grant. It is insisted that pl't'ff's' title is defeated under this condition.

But it will be observed, that the title under the grant vested in the grantee upon the line of the road being definitely fixed, and the indemnity lands being selected, the condition requiring the road to be constructed within a time prescribed was subsequent. It could be waived by the grantee, and a failure to enforce a forfeiture
97 and the final certification of the lands would be regarded as a waiver. The United States having failed to enforce the forfeiture, no other party can. The title therefore remains unimpaired in pl't'ff. (Schullenburg et al. vs. Herriman, 21 Wall., 44; Tucker vs. Ferguson, 22 Wall., 527; Barrett vs. Brooks, 21 Iowa, 144; Kittner vs. Story County, 28 Iowa, 35.

VII. The views we have expressed and the conclusions we have announced render the consideration of other questions discussed by counsel unnecessary. Other arguments could be presented based upon the facts herein set out, and other facts could be presented from the record supporting other arguments, all of which would give support to our conclusion; but the arguments we have presented are so satisfactory to our own minds that we deem it quite unnecessary to present others in support of our conclusions which dispose of the case.

It is our opinion that the judgment of the circuit court ought to be affirmed.

98 Twenty-three other cases, which need not be named by their titles here, were submitted upon the same abstract with this case. Their titles fully appear in the abstract and additional abstracts filed by def't. The identical questions decided in this case arise in those. The judgment of the courts below were the same as the judgment appealed from in this case. The def'ts in each case appealed. A judgment of affirmance will be entered in each case.

99 And afterwards, on the 20th day of March, 1879, the following record entry was made:

THE C., R. I. & P. R. R. Co.
vs.
GEO. W. GRINNELL AND 23 OTHER CASES.

Appeals from Shelby, Audubon, & Crawford Counties.

On this day this cause is submitted to the court on printed argument of counsel.

100 And on the 14th day of June appears the following record entry, in words and figures as follows, to wit:

THE C., R. I. & P. R. R. CO.
vs.
GEO. W. GRINNELL, APP'L'T.

Appeal from Shelby circuit court.

In this cause, the court being fully advised in the premises, file their written opinion affirming the judgment of the circuit court; it is therefore considered by the court that the judgment of the court below be, and it hereby is, affirmed, and that a writ of procedendo issue accordingly. It is further considered by the court that the appellant pay the costs of this appeal, taxed at $, and that execution issue therefor. It is further considered by the court that the same order as above be, and hereby is, made in the following cases, to wit:

2. The C., R. I. & P. R. R. Co. vs. H. P. Emery, app'l't, Audubon circuit.
3. Same vs. John Robinson, Audubon circuit.
4. Same vs. Jos. Thornisch, " "

101 5. The C., R. I. & P. R. R. Co. vs. Mary L. Bruce, app'l't, Audubon circuit.
6. Same vs. A. Hammond, app'l't, Audubon circuit.
7. Same " S. E. Ogborn, " " "
8. Same " E. E. Ogborn " " "
9. Same " Geo. Ulnile, " " "
10. Chas. Stewart vs. W. D. Packard, app'l't, Audubon circuit.
11. Same " John Slater " Crawford dist.
12. Same " J. Weaktine, " " "
13. Same " Lydia Dunham, " " "
14. The C., R. I. & P. R. R. Co. vs. Andrew Wilfong, app'l't, Shelby c't.
15. Same vs. Ed. Pernuston, app'l't, Shelby c't.
16. Same " Geo. Darling, " " "
17. Same " A. L. Bell, " " "
18 Same " Chas. Brown, " " "
19. Same " Eben'zer Trefrey, " " "
20. Same " Vialetta Roper, " " "
21. Same " B. H. Lathrop, " " "
22. Joseph Tomlinson vs. John Bruce, app'l't, Audubon c't.
23. Same " S. B. S. Duncan, " " "
24. Same " Wm. Bruce, " " "

102 And on the 15th day of August, A. D. 1879, a petition for a writ of error to the Supreme Court of the United States was filed, in words and figures following, to wit:

103 *Petition for writs of error.*

To the Hon. J. M. Beck, chief justice of the supreme court of the State of Iowa.

In the case of George W. Grinnell, appellant, vs. The Chicago, Rock Island & Pacific Railroad Company, appellee, and twenty-three other cases against the same appellee, named and designated in the paper hereto attached, marked A, and in the accompanying consolidated record, the appellants respectfully apply to the Hon. J. M. Beck, chief

justice of said supreme court of the State of Iowa, for the allowance of writs of error in said cases, respectively, to the said supreme court of Iowa, to the end that the record and proceedings of said cases, with all things concerning the same, may be sent to the Supreme Court of the United States, in the city of Washington, D. C., on or before the
104 first day of the next term of said court, together with the writs applied for.

And the appellants, in support of their said application, state that the pl'tff in the court below prosecuted actions of *w*right to obtain the possession of the several tracts of land occupied by the def'ts below, appellants now; that the appellee, who was plaintiff below, based its right to the possession upon certain acts of Congress making grants of land to the State of Iowa for the construction of railroads and grants made by said State, and that the appellants, who were defendants below, under the practice prevailing in the State of Iowa, pleaded an equitable defence in each of the actions so prosecuted, denying that any of the lands occupied by them, respectively, were embraced in any of said grants made by Congress, and denying that the plaintiff below had any title to any of said lands, or any right or claim to the pos-
105 session. They further stated that said lands were public lands of the United States, subject to appropriation under the pre-emption and homestead laws; that they had entered upon them as bona-fide settlers under said pre-emption and homestead laws some time in 1871 and 1872, long prior to the commencement of said proceedings; that they had respectively erected houses on their said respective tracts, and had continuously resided in them with their families since the years 1871 & 1872, and had made valuable improvements on said lands, and that they were justly and legally entitled to enter and appropriate said tracts of land, respectively, under the pre-emption or homestead laws of the United States.

The appellants further state that in 1871 or 1872 the Chicago, Rock Island & Pacific R. R. Co., the appellee herein, conscious of its want of title to the lands in controversy and other adjoining tracts out-
106 side of the 20-mile limits of the amended grant of June 2d, 1864, applied to Congress for a confirmatory act, confirming its title to such lands; that Congress did pass such an act, entitled "An act to quiet the title to certain lands in the State of Iowa," which became a law January 31, 1873, without the President's signature (copy herewith), and appellants call attention to the fact that Congress incorporated into the act a proviso, excepting from its operation all lands settled upon in good faith and occupied at the date of the act by homestead or pre-emption settlers, and they aver that said proviso was inserted by Congress to protect the claims of appellants and other similar settlers who were then occupying similar tracts. Appellants pleaded said proviso in their defence, con*t*aining that the plaintiff below had no title to lands outside of the 20-mile limits of the amendatory
107 grant, except under said confirmatory act, in which the claims of appellants are virtually recognized, and the tracts occupied by them expressly excepted. The attention of the honorable chief justice is further called to an act of Congress of a general nature, entitled "An act to restore certain lands in Iowa to settlement under the homestead law, and for other purposes," approved June 15th, 1878 (copy herewith), which operates upon lands outside of the 20-mile limits of the amended grant of June 2d, 1864, excepted from the act of January 31st, 1873, and therefore upon the lands occupied by appellants, and recognizes

their right to enter and appropriate the same. The appellants contended that a proper construction of said several acts of Congress would protect them in their possession of the respective tracts in controversy, and in their right to appropriate the same under the homestead
108 or pre-emption laws of the United States, by virtue of their residence and improvements, their personal qualifications, and their full compliance with all the requirements of the statutes, so far as they have been permitted to do so.

The circuit courts of Iowa rendered judgments against the appellants, defendants below, and on appeal to the supreme court of Iowa said judgments were affirmed, whereby they became the final judgments of the highest court in the State of Iowa in which decisions could be rendered in said cases.

Appellants refer to Ferguson vs. McLaughlin (6 Otto, 96), and Hosmer vs. Wallace (7 Otto, 575), as sustaining their right to writs of error.

S. S. HENKLE,
Att'y for Pl'ffs in Error.

109 *Additional cases referred to in the foregoing petition.*

2.	H. P. Emery,	appellant,	vs. The C., R. I. & P. R. Co.,	Audubon circuit.
3.	John Robinson,	"	vs. same,	"
4.	Jos. Thornich,	"	vs. same,	"
5.	Mary L. Bruce,	"	vs. same,	"
6.	A. Hammond,	"	vs. same,	"
7.	S. E. Ogborn,	"	vs. same,	"
8.	E. E. Ogborn,	"	vs. same,	"
9.	George Ulrich,	"	vs. same,	"
10.	W. D. Packard,	"	vs. Chas. Stewart,	"
11.	John Slater,	"	vs. C., R. I. & P. R. Co.,	Crawford district.
12.	Jacob Weakline,	"	vs. Same,	"
13.	Lydia Dunham,	"	vs. Same,	"
14.	Andrew Wilfong,	"	vs. Same,	Shelby ct.
15.	Ed. Perniston,	"	vs.	"
16.	Geo. Darling,	"	vs.	"
17.	A. L. Bell,	"	vs.	"
18.	Chas. Brown,	"	vs.	"
19.	Ebenezer Trefrey,	"	vs.	"
20.	Vialetta Roper,	"	vs.	"
21.	B. H. Lathrop,	"	vs.	"
22.	John Bruce,	"	vs. Tomlinson,	Audubon circuit.
23	S. B. S. Duncan,	"	vs. Same,	"
24.	Wm. Bruce,	"	vs. Same,	"

110 The following is endorsed on back of petition:

This petition presented to me this August 5th, 1879, and thereon I allow writs of error in each case, respectively. The plaintiff in error in each case to execute bonds, with good and sufficient sureties, as required by law, in the sum of one hundred dollars.

J. M. BECK,
Ch. Justice Sup. Court of Iowa.

111 AN ACT to quiet the title to certain lands in the State of Iowa.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the title to the

lands in the State of Iowa, heretofore approved and certified by the Department of the Interior for railroad purposes, to aid in the construction of a railroad from the city of Davenport, via Iowa City, to Council Bluffs, under the grants made by Congress, according to the adjustments thereof made at the General Land Office be, and the same is hereby, confirmed to the Mississippi and Missouri Railroad Company, and the Chicago, Rock Island and Pacific Railroad Company, and their assigns, they being the corporations to whom said lands were certified: Provided, That this act shall be construed as conveying only any reversionary or other interest which the United States may have in said lands;
112 and all lands settled upon in good faith and now occupied by homestead or pre-emption settlers shall be excluded from the operations of this act.

J. G. BLAINE,
Speaker of the House of Representatives.
SCHUYLER COLFAX,
Vice-President of the United States and President of the Senate.

Received by the President, January 20, 1873.

113 AN ACT to restore certain lands in Iowa to settlement under the homestead law, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, directed to restore to settlement under the pre emption and homestead law, by published notice, all vacant unappropriated lands heretofore withdrawn for the Mississippi and Missouri Railroad in the State of Iowa, situated more than twenty miles from the amended line of route as located under the act approved June second, eighteen hundred and sixty-four, entitled "An act to amend an act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," approved May fifteenth, eighteen hundred and fifty-six: Provided, That all actual
114 settlers now residing on said lands shall be permitted to enter not exceeding one hundred and sixty acres for each head of a family or single man over twenty-one years of age, embracing improvements, in preference to any other person, on making proof of such settlement in accordance with rules to be prescribed by the Secretary of the Interior: And provided further, That all actual settler, now residing upon the lands hereinbefore mentioned shall be permitted to make the final proof now required by law, and receive their patents at the expiration of five years from the date of their actual settlement.

SEC. 2. That this act shall not include any lands embraced in the confirmatory act approved January thirty-first, eighteen hundred and seventy-three, entitled "An act to quiet title to certain lands in the State of Iowa," approved June 15th, 1878.

115 Also appears the following writs of error and copies of citations and bonds in the foregoing entitled cause:

116 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the records and proceedings, as also in the rendition of the

judgment of a plea, which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between George W. Grinnell and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege and exemption claimed under said statutes, a manifest error hath happened, to the great damage of the said George W. Grinnell, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same,

117 to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

118 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein George W. Grinnell is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said pl't'ff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf. Witness Hon. J. M. Beck, chief justice of the supreme court of the State of Iowa, this fifth day of August, in the year of our Lord one thousand eight hundred & seventy-nine.

JOSEPH M. BECK,
Chief Justice, Supreme Court Iowa.

119 UNITED STATES,
District of Iowa:

DES MOINES, IA., *Sept.* 13, '79.

We hereby accept due and legal service of the within citation, and acknowledge a receipt of the copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for the C., R. I. & P. R. Co.

120 Know all men by these presents, that we, George W. Grinnell, as principal, and Emma F. Klingbeil and William Crakes, as sureties, are held and firmly bound unto the Chicago, Rock Island & Pacific R. R. Co., in the sum of one hundred dollars, which sum, well and truly to be paid to the said C., R. I. & P. R. R. Co., its executors and assigns, we hereby bind ourselves firmly by these presents.

The condition of the above obligation is such that whereas the said George W. Grinnell has appealed from the judgment or order of the supreme court of the State of Iowa, rendered on the day of , A. D. 18 , in an action then pending in said court, wherein the said Chicago, Rock Island & Pacific R. R. Co. was plaintiff, and the said Geo. W. Grinnell was defendant:

Now, if the said appellant shall pay to the said appellee all costs and damages that shall be adjudged or order appealed from, in case
121 it shall be affirmed, and any judgment or order which the United States Supreme Court may render or order to be rendered, then this obligation to be void; otherwise to be and to remain in full force and virtue.

Witness our hands this 9th day of August, A. D. 1879.

GEORGE W. GRINNELL, *Prin.*
EMMA F. KLINGBEIL,
WILLIAM CRAKES, *Sureties.*

STATE OF IOWA,
Shelby County, ss:

We, William Crakes and Emma F. Klingbeil, sureties in the above bond, on oath depose and say, and each for himself says that they, and each of them, are worth the sum of one hundred dollars over and above all property exempt from execution.

WILLIAM CRAKES.
EMMA F. KLINGBEIL.

Subscribed and sworn to before me, by William Crakes and Emma F. Klingbeil, this 9th day of August, A. D. 1879.

[SEAL.] H. C. HOLCOMB,
Clerk.

122 STATE OF IOWA,
Shelby County, ss:

I, H. C. Holcomb, clerk of the district court in and for said county, hereby certify that the surety on the within bond is worth the amount therein specified, and if the same were presented to me I would approve the same.

[SEAL.] H. C. HOLCOMB,
Clerk.

Bond approved Aug. 13, 1879.

J. M. BECK, *Ch. J.*

123 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between H. P. Emery and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath

happened to the great damage of the said H. P. Emery, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same to the
124 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

125 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein H. P. Emery is pl't'ff in error, and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl't'ff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. Witness the Hon. Joseph M. Beck, ch. justice of the supreme c't of the State of Iowa, this fifth day of August, A. D. 1879.

JOSEPH M. BECK,
Chief Justice Supreme Court Iowa.

126 UNITED STATES,
District of Iowa:

DES MOINES, IA., *Sept.* 13, '79.

We hereby accept due and legal service of the within citation, and acknowledge receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for the C., R. I. & P. R. R. Co.

127 Know all men by these presents that we, H. P. Emery, as principal, and Mathias Gabel, as surety, are held and firmly bound unto the Chicago, Rock Island & Pacific Railroad Company in the penal sum of one hundred (100) dollars, for the payment of which, well and truly to be paid, we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators, sealed with our seals and dated this eleventh day of August, A. D. 1879.

The condition of the above obligation is such that whereas a writ of error has been allowed from the Supreme Court of the United States to the supreme court of the State of Iowa, as authorized by law and in the manner provided by law, in the case of the Chicago, Rock Island & Pacific Railroad Co. vs. H. P. Emery, removing said cause to the
128 Supreme Court of the United States: Now, therefore, if the said

H. P. Emery shall prosecute his said writ of error to effect, or if he fail to make his plea good shall answer all damages and costs sustained by the said Chicago, Rock Island and Pacific Railroad Co., and perform all things requisite therein, according to the law and practice of the United States and its courts, then these presents and obligation, shall be void, otherwise to remain in full force.

Exira, Aug. 11th, 1879.

H. P. EMERY.
MATHIAS GABEL.

STATE OF IOWA,
Audubon County:

Mathias Gabel, of said county, being duly and severally sworn, say. and each for himself says, that he is one of the sureties named in the foregoing bond, that he is a resident of the State of Iowa, and that he is worth the sum of two hundred dollars beyond the amount
129 of his debts, and that he has property liable to execution in this State equal to one hundred dollars.

MATHIAS GABEL.

Subscribed and sworn to before me this eleventh day of Aug., 1879.
[SEAL.] FRANK P. BRADLEY,
Clerk Dist. Court.

I hereby certify that, in my opinion, the sureties in the foregoing bond are amply good and sufficient, and the same would be approved by me.

Exira, Aug. 11th, 1879.

FRANK P. BRADLEY, *Cerk.*

Bond approved Aug. 13th, 1879.

130 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Robinson and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened to the great damage of the said John Robinson as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the
131 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R Waite, Chief Justice of the Su-

preme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

132 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein John Robinson is pl'tff in error and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl'tff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, chief j. of the supreme court of the State of Iowa, this fifth day of August, A. D. 1879.

JOSEPH M. BECK,
Chief Justice Supreme Court of Iowa.

133 UNITED STATES,
District of Iowa:

DES MOINES, IOWA, *Sept. 13th*, 1879.

We hereby accept due and legal service of the within citation, and acknowledge the receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for C., R. I. & P. R. R. Co.

134 Know all men by these presents that we, John Robison, as principal, and J. M. Bryan, as surety, are held and firmed unto the Chicago, Rock Island and Pacific Railroad Company in the penal sum of one hundred dollars ($100), for the payment of which, well and truly to be paid, we do hereby, jointly and severally, bind ourselves, our heirs, executors, and administrators, sealed with our seals and dated this 11th day of Aug., A. D. 1879.

The condition of the above obligation is such that whereas a writ of error has been allowed from the Supreme Court of the United States to the supreme court of the State of Iowa, as authorized by law and in the manner provided by law in the case of the Chicago, Rock Island and Pacific Railroad Company vs. John Robison, removing said cause to the Supreme Court of the United States:

135 Now, therefore, if the said John Robison shall prosecute his said writ of error to effect, if he fail to make his plea good shall answer all damages and costs sustained by the Chicago, Rock Island and Pacific Railroad Company, and perform all things requisite therein according to the law and practice of the United States and its courts, then these presents and obligations shall be void, otherwise to remain in full force.

Dated Exira, Aug. 11th, 1879.

JOHN ROBISON.
J. M. BRYAN.

STATE OF IOWA,
Audubon County:

J. M. Bryan, being duly sworn, say, and each for himself, deposes and

says that he is a resident of the State of Iowa; that he is one of the sureties in the foregoing bond; that he is worth the sum of two hundred dollars beyond the amount of his debts and liabilities, and
136 that he has property subject to execution in this State equal to one hundred dollars.

Exira, Aug. 11, 1879.

J. M. BRYAN.

Subscribed and sworn to before me this 11th day of Aug., A. D. 1879.

[SEAL.] FRANK P. BRADLEY,
Clerk Dist. Court.

STATE OF IOWA,
Audubon Co.:

I hereby certify that I am acquainted with the sureties in the above bond, and believe them to be amply good and sufficient for the amount of same.

FRANK P. BRADLEY, *Clerk.*

Bond approved Aug. 13th, 1879.

J. M. BECK, *Ch. J.*

137 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Joseph Thornich and the Chicago, Rock Island and Pacific Railroad Company wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened to the great damage of the said Joseph Thornich, as by his complaint appears: we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the
138 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of December, 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court of the District of Iowa.

139 The United States of America to the Chicago, Rock Island and Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Joseph Thar-

nisch is pl'tff in error, and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl'tff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, Ch. J. of the supreme court of the State of Iowa, this 5th day of August, A. D. 1879.

JOSEPH M. BECK,
Ch. J. Supreme Court, Iowa.

140 UNITED STATES,
District of Iowa:

DES MOINES, IA.,
Sept. 13, '79.

We hereby accept due and legal service of the within citation, and acknowledge the receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Atty's for the C., R. I. & P. R. R. Co.

141 Know all men by these presents, that we, Joseph Tharnich, as principal, and Theodore Brown, as surety, are held and firmly bound unto the Chicago, Rock Island and Pacific Railroad Company in the penal sum of one hundred (100) dollars, for the payment of which, well and truly to be paid, we do hereby, jointly and severally, bind ourselves, our heirs, executors, and administrators. Sealed with our seals and dated this 11th day of Aug., A. D. 1879.

The condition of the above obligation is such that whereas a writ of error has been allowed from the Supreme Court of the United States to the supreme court of the State of Iowa, as authorized by law and in the manner provided by law, in the case of The Chicago, Rock Island and Pacific Railroad Company vs. Joseph Tharnich, removing said cause to the Supreme Court of the United States:

142 Now, therefore, if the said Joseph Tharnich shall prosecute his said writ of error to effect, or if he fail to make his plea good shall answer all damages and costs sustained by the said Chicago, Rock Island and Pacific Railroad Company, and perform all things requisite therein according to the law and practice of the United States and its courts, then these presents and obligation shall be void, otherwise to remain in full force.

Exira, Aug. 11th, 1879.

JOSEPH THARNISCH.
MATHIAS GABEL, *Agt.*
THEODORE BROWN.

STATE OF IOWA,
Audubon County:

Theodore Brown, of said county, being duly and severally sworn, say, and each for himself, says that he is one of the sureties named in the foregoing bond; that he is a resident of the State of Iowa; and
143 that he is worth the sum of two hundred dollars beyond the amount of his debts, and that he has property liable to execution in this State equal to one hundred dollars.

THEODORE BROWN.

Subscribed and sworn to before me & in my presence, by said Theodore Brown, this 11th day of August, 1879.

[SEAL.] FRANK P. BRADLEY,
Clerk Dist. Court.

I hereby certify that in my opinion the surety in the foregoing bond is amply good and sufficient, and same would be approved by me.

FRANK P. BRADLEY, *Clerk*,

Bond approved Aug. 13, 1879.

J. M. BECK, *Ch. J.*

144 UNITED STATES OF AMERICA. *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Mary L. Bruce and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened, to the great damage of the said Mary L. Bruce, as by her complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to
145 the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

146 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Mary L. Bruce is pl't'ff in error and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl't'ff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, ch. j. of the supreme court of the State of Iowa, this fifth day of August, A. D. 1879.

JOSEPH M. BECK,
Chief Justice Supreme Court, Iowa.

147 UNITED STATES,
District of Iowa:

DES MOINES, IA., *Sept. 13th*, 1879.

We hereby accept due and legal service of the within citation and acknowledge receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for C., R. I. & P. R. R. Co.

148 Know all men by these presents that we, Mary L. Bruce, as principal, and John C. Bonwell, as surety, are held and firmly bound unto the Chicago, Rock Island and Pacific Railroad Co. in the penal sum of one hundred (100) dollars, for the payment of which, well and truly to be paid, we do hereby, jointly and severally, bind ourselves, our heirs, and executors and administrators. Sealed with our seals and dated this eleventh day of Aug., A. D. 1879.

The condition of the above obligation is such that whereas a writ of error has been allowed from the Supreme Court of the United States to the supreme court of the State of Iowa as authorized by law, and in the manner provided by law, in the case of the Chicago, Rock Island and Pacific Railroad Co. vs. Mary L. Bruce, removing said cause to the Supreme Court of the United States:

149 Now, therefore, if the said Mary L. Bruce shall prosecute his said writ of error to effect, or if he fail to make his plea good, shall answer all damages and costs sustained by the said Chicago, Rock Island and Pacific Railroad Co., and perform all things requisite therein according to the law and practice of the United States and its court, then these presents and obligation shall be void; otherwise to remain in full force.

Exira, Aug. 11, 1879.

MARY L. BRUCE,
Per JOHN BRUCE, *Agent.*
JOHN C. BONWELL.

STATE OF IOWA,
Audubon County:

John C. Bonwell, of said county, being duly and severally sworn, say, and each for himself says, that he is one of the sureties named in the foregoing bond, that he is a resident of the State of Iowa, and

150 that he is worth the sum of two hundred dollars beyond the amount of his debts, and that he has property liable to execution in this State equal to one hundred dollars.

JOHN C. BONWELL.

Subscribed and sworn to by John C. Bonwell before me Aug. 11th, 1879.

[SEAL.] FRANK P. BRADLEY,
Clerk Dist. Court.

I hereby certify that in my opinion the surety on the above is amply good and sufficient, and the same would be approved by me.

FRANK P. BRADLEY,
Clerk D. C.

Bond approved Aug. 13, 1879.

J. M. BECK, *Ch. J.*

151 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between A. Hammond and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened, to the great damage of the said A. Hammond, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the

152 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

153 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein H. Hammond is pl't'ff in error, and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl't'ff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, ch. j. of the supreme court of the State of Iowa, this 5th day of August, A. D. 1879.

JOSEPH M. BECK,
Chief Justice Sup. C't I'a.

154 UNITED STATES,
Dist. of I'a:

DES MOINES, IOWA, *Sept.* 13, 1879.

We hereby accept due and legal service of the within citation and acknowledge receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for the C., R. I. & P. R. R. Co.

155 Know all men by these presents that we, A. Hammond, as principal, and George Bell, as sureties, are held and jointly bound unto

the Chicago, Rock Island & Pacific Railroad Co., in the penal sum of one hundred (100) dollars, for the payment of which well and truly to be paid we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators. Sealed with our seals and dated this eleventh day of August, A. D. 1879.

The conditions of the above obligation is such that whereas a writ of error has been allowed from the Supreme Court of the United States to the supreme court of the State of Iowa, as authorized by law, and in the manner provided by law in the case of the Chicago, Rock Island & Pacific Railroad Co. vs. A. Hammond, removing said cause to the
156 Supreme Court of the United States: Now, therefore if the said A. Hammond shall prosecute his said writ of error to effect, or if he fail to make his plea good, shall answer all damages and costs sustained by the said Chicago, Rock Island & Pacific Railroad Company, and perform all things requisite therein according to the law and practice of the United States and its courts, then these presents and obligation shall be void; otherwise to remain in full force.

Exira, Aug. 11, 1879.

A. HAMMOND.
GEORGE BELL.

STATE OF IOWA,
Audubon Co.:

George Bell, of said county, being duly and severally sworn, say, and each for himself says, that he is one of the sureties named in the foregoing bond; that he is a resident of the State of Iowa, and that he is worth the sum of two hundred dollars beyond the amount of his
157 debts, and that he has property liable to execution in this State equal to one hundred dollars.

GEORGE BELL.

Subscribed and sworn to before me and in my presence by said George Bell, this eleventh day of August, 1879.

[SEAL.] FRANK P. BRADLEY,
Clerk Dist. Court.

I hereby certify that in my opinion the surety in the foregoing bond is amply good and sufficient and the same would be approved by me. Aug., 1879.

FRANK P. BRADLEY, *Clerk.*

Bond approved Aug. 13th, 1879.

158 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorabje judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between S. E. Ogborn and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege and exemption claimed under said statutes, a manifest error hath happened to the great damage of the said S. E. Ogborn, as by his com-

plaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceeding aforesaid, with all things concerning the same, to the
159 Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] ED. R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

160 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited & admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein S. E. Ogborn is pl't'ff in error, and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl't'ff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Hon. J. M. Beck, ch. j. of the sup. c't of the State of Iowa, this 5th day of August, A. D. 1879.

JOSEPH M. BECK,
Chief Justice Supreme Court, Ia.

161 UNITED STATES,
Dist of Ia.:

DES MOINES, IOWA, *Sept.* 13, '79.

We hereby accept due & legal service of the within citation, and acknowledge receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Atty's for C., R. I. & P. R. R. Co.

162 Know all men by these presents that we, S. E. Ogborn, as principal, and E. E. Ogborn, as sureties, are held and firmly bound into the Chicago, Rock Island and Pacific Railroad Company in the penal sum of one hundred (100) dollars, for the payment of which, well and truly to be paid, we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators. Sealed with our seals, and dated this 11th day of Aug., A. D. 1879.

The condition of the above obligation is such that whereas a writ of error has been allowed from the Supreme Court of the United States to the supreme court of the State of Iowa, as authorized by law, and in the manner provided by law, in the case of the Chicago, Rock Island and Pacific Railroad Company vs. S. E. Ogborn, removing said cause to the Supreme court of the United States:

Now, therefore, if the said S. E. Ogborn shall prosecute his said

writ of error to effect, or if he fail to make his plea good, shall answer all damages and costs sustained by the said Chicago, Rock Island & Pacific Railroad Company, and perform all things requisite therein, according to the law and practice of the United States and its courts, then these presents and obligations shall be void; otherwise, to remain in full force.

Exira, Aug. 11th, 1879.

S. E. OGBORN.
E. E. OGBORN.

STATE OF IOWA,
Audubon County, ss:

E. E. Ogborn, of said county, being duly and severally sworn, say, and each for himself says, that he is one of the sureties named in the foregoing bond, that he is a resident of the State of Iowa, and that he is worth the sum of two hundred dollars beyond the amount of his debts, and that he has property liable to execution in this State equal to one hundred dollars.

E. E. OGBORN.

Subscribed and sworn to before me, and in my presence, by said E. E. Ogborn, this 11th day of August, 1879.

[SEAL.] FRANK P. BRADLEY,
Clerk Dist. Court.

I hereby certify that in my opinion the surety in foregoing bond is amply good and sufficient, and the same would be approved by me.

FRANK P. BRADLEY,
Clerk D. C.

Bond approved Aug. 13, 1879.

J. M. BECK, *Ch. J.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the Supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between E. E. Ogborn and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege and exemption claimed under said statutes, a manifest error hath happened, to the great damage of the said E. E. Ogborn, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

167 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein E. E. Ogborn is plaintiff in error and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl't'ff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Joseph M. Beck, chief justice of the supreme court of the State of Iowa, this 5th day of August, in the year A. D. 1879.

JOSEPH M. BECK,
Chief Justice Sup. Ct Ia.

168 UNITED STATES,
Dist. of Ia:

DES MOINES, IOWA, *Sept.* 13, '79.

We hereby accept due and legal service of the within citation, and acknowledge receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for the C., R. I. & P. R. R. Co.

169 Know all men by these presents that we, E. E. Ogborn, as principal, and Joseph F. Ogborn, as surety, are held and firmly bound unto the Chicago, Rock Island and Pacific Railroad Company in the penal sum of one hundred dollars, well and truly to be paid, we do hereby jointly and severally bind ourselves, our heirs, executors and administrators. Sealed with our seals, and dated this eleventh day of August, A. D. 1879.

The condition of the above bond is such that whereas a writ of error has been allowed by the Supreme Court of the United States to the supreme court of the State of Iowa as authorized by law, and in manner provided by law, in the case of the Chicago, Rock Island & Pacific Railroad Company vs. E. E. Ogborn, removing said cause to the Supreme Court of the United States:

Now, if the said E. E. Ogborn shall execute his said writ of
170 error to effect, or if he fails to make his plea good shall answer all damages and costs sustained by the said Chicago, Rock Island and Pacific Railroad Co., and perform all things requisite therein according to the law and practice of the United States and its courts, then these presents and obligations shall be void, otherwise to remain in full force.

Exira, Aug. 11th, 1879.

E. E. OGBORN.
JOSEPH F. OGBORN.

STATE OF IOWA,
Audubon Co., ss:

Joseph F. Ogborn, of said county, being duly sworn, deposes and says that he is a resident of the State of Iowa; that he is surety in the foregoing bond; that he is worth the sum of two hundred dollars beyond the amount of his debts; and that he has property liable to execution in the State of Iowa equal to one hundred dollars.

JOSEPH F. OGBORN.

171 Subscribed and sworn to before me, by Joseph F. Ogborn, this 11th day of Aug., A. D. 1879.

FRANK P. BRADLEY,
Clerk Dist. Court.

I hereby certify that in my opinion the surety in the foregoing bond is amply good and sufficient, and the same would be approved by me.

FRANK P. BRADLEY,
Clk D. C.

Bond approved Aug. 13th, 1879.

J. M. BECK, *C. J.*

172 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between George Ulrich and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege and exemption claimed under said statutes, a manifest error hath happened to the great damage of the said George Ulrich, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the
173 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

174 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office

of the supreme court of the State of Iowa, wherein Geo. Ulrich is plaintiff in error and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl't'ff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, chief justice of the supreme court of the State of Iowa, this fifth day of August, in the year of our Lord one thousand eight hundred & seventy-nine.

JOSEPH M. BECK,
Ch. J. Sup. Ct., Ia.

175 UNITED STATES,
District of Iowa:

DES MOINES, IA., *Sept. 13th*, 1879.

We hereby accept due and legal service of the within citation, and acknowledge receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Atty's for the C., R. I. & P. R. R. Co.

176 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between W. D. Packard and Charles Stewart, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened, to the great damage of the said W. D. Packard, as by his complaint appears; we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States,
177 together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct this error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.]

ED. R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

178 The United States of America to Charles Stewart, greeting:

You are hereby cited & admonished to be and appear at a Supreme Court of the United States Supreme Court, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein W. D. Packard is pl't'ff in error and you are def't in error, to

show cause, if any there be, why the judgment rendered against the said pl'tiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, ch. justice of the supreme court of the State of Iowa, this 5th day of August, A. D. 1879.

JOSEPH M. BECK,
Chief Justice Supreme Court, Iowa.

179 UNITED STATES,
District of Iowa:

DES MOINES, *Sept.* 13, '79.

We hereby accept due & legal service of the within citation, & acknowledge receipt of a copy there'f.

WRIGHT, GATCH & WRIGHT,
Atty's for the C., R. I. & P. R. R. Co.

180 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Slater and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened, to the great damage of the said John Slater, as by his complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same,
181 to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

182 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein John Slater is pl'tiff in error and you are def't in error, to show cause, if any there be, why the judg-

ment rendered against the said pl'tff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, C. J. of the S. C. of the State of Iowa, this fifth day of August, A. D. 1879.

JOSEPH M. BECK,
Chief Justice Sup. Ct. Ia.

183 Know all men by these presents that we, John Slater, principal, and Frank Woodall, sureties, are held & firmly bound unto the Chicago, Rock Island & Pacific R. R. Co. in the sum of one hundred dollars, lawful money of the United States, well and truly to be paid to the said Chicago, Rock Island & Pacific R. R. Co., his heirs, executors, & assigns.

The condition of this obligation is such, that whereas the said John Slater has appealed from the judgment of the supreme court of the State of Iowa, in and for county, rendered on the 14th day of June, A. D. 1879, in an action then pending in said court, wherein the said The Chicago, Rock Island & Pacific R. R. Co., plaintiff, and the said John Slater, defendant.

Now, if the said appellant, John Slater, shall pay to the said appellee all costs that shall be adjudged against said appellant on said appeal, and shall also satisfy and perform the said judgment appealed
184 from, in case it shall be affirmed, and any judgment or order which the general term may render, or order to be rendered by the said United States Supreme Court, then this obligation to be void; otherwise to remain in full force and virtue.

Dated this 11th day of August, A. D. 1879.

JOHN SLATER, *Prin.*
F. WOODALL, *Surety.*

STATE OF IOWA,
Crawford County, ss:

We, Frank Woodall, being severally sworn, depose and say, and each for himself says, that he is a resident of the State of Iowa; that he is one of the sureties in the foregoing bond; that he is worth the sum of one hundred dollars beyond the amount of his debts, and that he has property liable to execution in the State of Iowa equal to two hundred dollars.

F. WOODALL.

Sworn to before me & subscribed in my presence by the said Frank Woodall this 11th day of August, 1879.

[SEAL.] W. S. WILSON, *Clerk.*

Bond approved Aug. 14, 1879.

J. M. BECK, *C. J.*

185 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between Jacob Weakline and the Chicago, Rock Island and Pacific Railroad Company,

wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened to the great damage of the said Jacob Weakline, as by his complaint appears: we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the
186 United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States the 12th day of September. A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

187 The United States of America to The Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited & admonished to be & appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of August next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Jacob Weakline is pl'tiff in error and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl'tiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, chief justice of the supreme court of the State of Iowa, this 5th day of August, A. D. 1879.

JOSEPH M. BECK,
Chief Justice Supreme Court, Ia.

188 UNITED STATES,
District of Iowa:

DES MOINES, IOWA, *Sept. 13th*, 1879.

We hereby accept due and legal service of the withi citation and acknowledge receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for the C. R. R. I. & P. R. R. Co.

189 Know all men by these presents that we, Jacob Weakline, principal, and , sureties, are held and firmly bound unto The Chicago, Rock Island & Pacific R. R. Co. in the sum of one hundred dollars, lawful money of the United States, well and truly to be paid to the said Chicago, Rock Island & Pacific R. R. Co., his heirs, executors, and assigns.

The condition of this obligation is such that whereas the said Jacob Weakline has appealed from the judgment of the supreme court of the State of Iowa, rendered on the 14th day of June, A. D. 1879, in an action then pending in said court, wherein the said Chicago, Rock Island & Pacific R. R. Co., plaintiff, and the said Jacob Weakline, defendant:

Now, if the said appellant, Jacob Weakline, shall pay to the said appellee all costs that shall be adjudged against said appellant on
190 said appeal, and shall also satisfy and perform the said judgment appealed from, in case it shall be affirmed, and any judgment or order which the general term may render or order to be rendered by the said United States Supreme Court, then this obligation to be void; otherwise to remain in full force and virtue.

Dated this 14th day of August, A. D. 1879.

JACOB WEAKLINE, *Prin.*
A. D. MALONY, *Sureties.*

STATE OF IOWA,
Crawford County, ss:

We, A. D. Malony, being duly sworn, depose and say, and each for himself says, that he is a resident of the State of Iowa; that he is one of the sureties in the foregoing bond; that he is worth the sum of one hundred dollars beyond the amount of his debts, and that he has property liable to execution in the State of Iowa equal to two hundred dollars.

A. D. MALONEY.

Subscribed & sworn to before me, by the said A. D. Malony, this 11th day of Aug., 1879.

[SEAL.] W. S. WILSON, *Clerk.*

Bond approved Aug. 14.

191 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said supreme court, before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Lydia Dunham and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened, to the great damage of the said Lydia Dunham, as by her complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same,
192 to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

193 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Lydia Dunham is pl'tff in error, and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl'tff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, ch. j. of the supreme court of the State of Iowa, this fifth day of August, 1879.

JOSEPH M. BECK,
Ch. Justice Sup. C't Iowa.

194 UNITED STATES,
District of Iowa:

DES MOINES, IA.,
Sept. 13*th*, 1879.

We hereby accept due and legal service of the within citation, and acknowledge the receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for the C. R. I. & P. R. R. Co.

195 Know all men by these presents that we, Lydia Dunham, principal, and , sureties, are held and firmly bound unto the Chicago, Rock Island & Pacific R. R. Company, in the sum of one hundred dollars, lawful money of the United States, well and truly to be paid to the said Chicago, Rock Island & Pacific R. R. Co., his heirs, executors, and assigns.

The condition of this obligation is such that whereas the said Lydia Dunham has appealed from the judgment of the supreme court of the State of Iowa, in and for , rendered on the 14th day of June, A. D. 1879, in an action then pending in said court, wherein the said Chicago, Rock Island & Pacific R. R. Co. plaintiff, and the said Lydia Dunham. defendant:

Now, if the said appellant, Lydia Dunham, shall pay to the said appellee all costs that shall be adjudged against said appellant on said appeal, and shall also satisfy and perform the said judgment ap-
196 pealed from in case it shall be affirmed, and any judgment or order which the general term may render, or order to be rendered by the United States Supreme Court, then this obligation to be void; otherwise to remain in full force and virtue.

Dated this 11th day of August, A. D. 1879.

LYDIA DUNHAM, *Prin.*
E. J. TROBRIDGE, *Surety.*

STATE OF IOWA,
Shelby County, ss:

I, E. J. Trobridge, being duly sworn, depose and say that I am a resident of the State of Iowa; that I am surety in the foregoing bond; that I am worth the sum of one hundred dollars beyond the amount of his debts; and that he has property liable to execution in the State of Iowa equal to two hundred dollars.

E. J. TROBRIDGE.

Sworn to before me & subscribed in my presence by the said E. J. Trobridge, this 12th day of August, 1879.

[SEAL.] H. C. HOLCOMB, *Clerk.*

197 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable judges of the supreme court of the State of Iowa, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Andrew Wilfong and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened, to the great damage of the said Andrew Wilfong, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same,

198 to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,

Clerk of the United States Circuit Court for the District of Iowa.

199 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Andrew Wilfong is pl't'ff in error, and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl't'ff in error, as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, chief justice of the supreme court of the State of Iowa, this 5th day of August, A. D. 1879.

JOSEPH M. BECK,
Chief Justice Supreme Court, Ia.

200 UNITED STATES,
District of Iowa:

DES MOINES, IA.,
Sept. 13th, 1879.

We hereby accept due & legal service of the within citation, and acknowledge the receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for The C., R. I. & P. R. R. Co.

201 Know all men by these presents that we, Andrew H. Wilfong as principal, and William Constable, as surety, are held and firmly bound unto the Chicago, Rock Island & Pacific R. R. Co., in the sum of one hundred dollars, which sum well and truly to be paid to the said C., R. I. & P. R. R. Co., its executors and assigns, we hereby bind ourselves firmly by these presents.

The condition of the above obligation is such that, whereas the said Andrew Wilfong has appealed from the judgment or order of the supreme court of the State of Iowa, on the day of , A. D. 18 , in an action then pending in said court, wherein the said Chicago, Rock Island & Pacific R. R. Co. was pl'tff, and the said Andrew Wilfong was defendant: Now, if the said appellant shall pay to the said appellee all costs and damages that shall be adjudged against said appellant
202 on said appeal, and shall also satisfy or perform the said judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the United States Supreme Court may render or order to be rendered, then this obligation to be void; otherwise to be and to remain in full force and virtue.

Witness our hands this 9th day of August, A. D. 1879.

A. H. WILFONG, *Prin.*
WM. CONSTABLE, *Surety.*

STATE OF IOWA,
Shelby County, ss:

I, Wm. Constable, surety in the above bond, on oath depose and say, that I am worth the sum of one hundred dollars over and above all property exempt from execution.

WM. CONSTABLE.

Subscribed and sworn to before me by William Constable this 9th day of August, A. D. 1879.

[SEAL.] H. C. HOLCOMB, *Clerk.*

203 STATE OF IOWA,
Shelby County, ss:

I, H. C. Holcomb, clerk of the district court in and for said county, hereby certify that the surety on the within bond is worth the amount therein specified, and if the same were presented to me I would approve the same.

[SEAL.] H. C. HOLCOMB, *Clerk.*

Bond approved Aug. 13, 1879.

J. M. BECK, *Ch. J.*

204 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the

judgment of a plea which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Ed. Perniston and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened, to the great damage of the said Ed. Perniston, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the
205 Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.]

EDWARD R. MASON,
Clerk of the United States Circuit Court
for the District of Iowa.

206 The United States of America to The Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Ed. Perniston is pl't'ff in error, and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl't'ff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, ch. j. of the supreme court of the State of Iowa, this fifth day of August, 1879.

JOSEPH M. BECK,
Chief Justice Sup. C't Iowa.

207 UNITED STATES,
District of Iowa:

DES MOINES, IA., *Sept. 13th*, 1879.

We hereby accept due and legal service of the within citation, and acknowledge the receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for the C., R. I. & P. R. Co.

208 Know all men by these presents that we, Edmund Perniston, as principal, and William Tibbott, as sureties, are held and firmly bound unto the Chicago, Rock Island & Pacific R. R. Co. in the sum of one hundred dollars, which sum well and truly to be paid to the said C., R. I. & P. R. R. Co., its executors and assigns, we hereby bind ourselves firmly by these presents.

The condition of the above obligation is such that whereas the said Edmund Permiston has appealed from the judgment or order of the supreme court of the State of Iowa, rendered on the day of A. D. 18 , in an action then pending in said court, wherein the said C., R. I. & P. R. R. Co. was plaintiff, and the said Edward Permiston was deft.: Now if the said appellant shall pay to the said appellee all costs and damages that shall be adjudged against said appellant on said
209 appeal, and shall also satisfy or perform the said judgment or order appealed from in case it shall be affirmed, and any judgment or order which the United States Supreme Court may render, or order to be rendered, then this obligation to be void; otherwise to be and to remain in full force and virtue.

Witness our hands this 9th day of August, A. D. 1879.

EDMUND PERMISTON, *Pr.*
WILLIAM TIBBOTT, *Surety.*

STATE OF IOWA,
Shelby County, ss:

I, William Tibbott, surety in the above bond, on oath depose and say that I am worth the sum of one hundred dollars over and above all property exempt from execution.

WILLIAM TIBBOTT.

Subscribed and sworn to before me by William Tibbott this 9th day of August, A. D. 1879.

[SEAL.] H. C. HOLCOMB, *Clerk.*

210 STATE OF IOWA,
Shelby County, ss:

I, H. C. Holcomb, clerk of the district court in and for said county, hereby certify that the surety on the within bond is worth the amount therein specified, and if the same were presented to me I would approve the same.

[SEAL.] H. C. HOLCOMB, *Clk.*

Bond approved Aug. 13, 1879.

J. M. BECK, *Ch. J.*

211 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between George Darling and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened, to the great damage of the said George Darling, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the

212 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, what the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

213 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Geo. Darling is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said pl't'ff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Joseph M. Beck, chief justice of the supreme court of the State of Iowa, this fifth day of August, in the year of our Lord one thousand eight hundred and seventy-nine.

JOSEPH M. BECK,
Chief Justice S. C. Ia.

214 UNITED STATES,
District of Iowa:

DES MOINES, IOWA, *Sept. 13th*, 1879.

Service of the within citation and the receipt of a copy thereof is duly acknowledged hereby.

WRIGHT, GATCH & WRIGHT,
Attorneys for the Chicago, Rock Island & Pacific R. R. Co.

215 Know all men by these presents that we, George Darling, as principal, and W. J. Davis, as sureties, are held and firmly bound unto the Chicago, Rock Island and Pacific R. R. Co. in the sum of one hundred dollars, which sum well and truly to be paid to the said C., R. I. & P. R. Co., its executors and assigns, we hereby bind ourselves firmly by these presents.

The condition of the above obligation is such that whereas the said George Darling has appealed from the judgment or order of the supreme court of the State of Iowa, rendered on the day of , A. D. 18 , in an action then pending in said court, wherein the said C., R. I. & P. R. R. Co. was pl't'ff, and the said George Darling was defendant:

Now, if the said appellant shall pay to the said appellee all costs and damages that shall be adjudged against said appellant on said appeal, and shall also satisfy or perform the said judgment or order
216 appealed from, in case it shall be affirmed, and any judgment or order which the United States Supreme Court may render or order to be rendered, then this obligation to be void; otherwise to be and to remain in full force & virtue.

Witness our hands this 9th day of August, A. D. 1879.

GEO. DARLING, *Prin.*
W. J. DAVIS, *Sureties.*

STATE OF IOWA,
Shelby County, ss:

I, W. J. Davis, surety in the above bond, on oath depose and say that I am the sum of one hundred dollars over and above all property exempt from execution.

W. J. DAVIS.

Subscribed and sworn to before me by W. J. Davis this 9th day of August, A. D. 1879.

[SEAL.] H. C. HOLCOMB, *Clerk.*

217 STATE OF IOWA,
Shelby County, ss:

I, H. C. Holcomb, clerk of the district court in and for the said county, hereby certify that the surety on the within bond is worth the amount therein specified, and if the same were presented to me I would approve the same.

[SEAL.] H. C. HOLCOMB, *Clerk.*

Bond approved Aug. 13, 1879.

J. M. BECK, *C. J.*

218 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between A. L. Bell and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege and exemption claimed under said statutes, a manifest error hath happened to the great damage of the said A. L. Bell, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the
219 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

220 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's

office of the supreme court of the State of Iowa, wherein Andrew L. Bell is pl't'iff in error, and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl't'ff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, chief justice of the supreme court of the State of Iowa, this 5th day of August, A. D. 1879.

JOSEPH M. BECK,
Chief Justice Sup. C't Ia.

221 UNITED STATES,
Dist. of Iowa:

DES MOINES, IA.,
Sept. 13*th*, 1879.

We hereby accept*ed* due and legal service of the within citation, and acknowledge the receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for the C., R. I. & P. R. R. Co.

222 Know all men by these presents that we, Andrew L. Bell, as principal, and William Crakes, as sureties, are held and firmly bound unto the Chicago, Rock Island and Pacific R. R. Co., in the sum of one hundred dollars, which sum well and truly to be paid to the said Chicago, Rock Island & Pacific R. R. Co., its executors and assigns, we hereby bind ourselves firmly by these presents.

The condition of the above obligation is such, that whereas the said Andrew L. Bell has appealed from the judgment or order of the supreme court of the State of Iowa, rendered on the day of A. D. 18 , in an action then pending in said court, wherein the said Chicago, Rock Island & Pacific R. R. Co. was pl't'ff, and the said Andrew L. Bell was defendant:

Now, if the said appellant shall pay to the said appellee all costs and damages that shall be adjudged against said appellant on said appeal, and shall satisfy or perform the said judgment or order appealed
223 from, in case it shall be affirmed, and any judgment or order which the United States Supreme Court may render or order to be rendered, then this obligation to be void, otherwise to be and to remain in full force and virtue.

Witness our hands this 9th day of August, A. D. 1879.

ANDREW L. BELL, *Prin.*
WILLIAM CRAKES, *Sure.*

STATE OF IOWA,
Shelby County, ss:

I, William Crakes, surety in the above bond, on oath depose and say that he is worth the sum of one hundred dollars over and above all all property exempt from execution.

WILLIAM CRAKES.

Subscribed and sworn to before me by William Crakes this 9th day of August, A. D. 1879.

[SEAL.] H. C. HOLCOMB, *Clerk.*

224 STATE OF IOWA,
Shelby County:

I, H. C. Holcomb, clerk of the district court in and for said county,

hereby certify that the surety on the within bond is worth the amount therein specified, and if the same were presented to me I would approve the same.

[SEAL.] H. C. HOLCOMB, *Clerk.*

Bond approved Aug. 13, 1879.

J. M. BECK, *Ch. J.*

225 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Chas. Brown and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened, to the great damage of the said Chas. Brown, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court
226 of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

227 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Charles Brown pl't'ff in error, and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl't'ff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, chief justice of the supreme court of the State of Iowa, this fifth day of August, in the year of our Lord one thousand eight hundred & seventy-nine.

JOSEPH M. BECK,
Chief Justice Supreme Court Ia.

228 UNITED STATES,
District of Iowa:

DES MOINES, IA., *Sept.* 13, 1879.

We hereby accept due and legal service of the within citation, and acknowledge receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Attorneys for the Chicago, Rock Island & Pacific R. R. Co.

229 Know all men by these presents that we, Charles Brown, as principal, and E. J. Trobridge, as surety, are held and firmly bound unto the Chicago, Rock Island and Pacific R. R. Co. in the sum of one hundred dollars, which sum well and truly to be paid to the said C., R. I. & P. R. R. Co., its heirs and assigns, we hereby bind ourselves firmly by these presents.

The consideration of the above obligation is such that whereas the said Chas. Brown has appealed from the judgment or order of the supreme court of the State of Iowa, rendered on the day of , A. D. 187 , in an action then pending in said court, wherein the said C., R. I. & P. R. R. Co. was plaintiff, and the said Charles Brown was defendant:

Now, if the said appellant shall pay to the said appellee all costs and damages that shall be adjudged said appellant on said appeal,
230 and shall also satisfy or perform the said judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the United States Supreme Court may render or order to be rendered, then this obligation to be void, otherwise to be and to remain in full force and virtue.

Witness our hands this 9th day of August, A. D. 1879.

CHARLES BROWN, *Principal.*
E. J. TROBRIDGE, *Surety.*

STATE OF IOWA,
Shelby County, ss:

I, E. J. Trobridge, surety in the above bond, on oath depose and say that I am worth the sum of one hundred dollars, over and above all property exempt from execution.

E. J. TROBRIDGE.

Subscribed & sworn to before me by this 9th day of August, 1879.

[SEAL.] H. C. HOLCOMB, *Clerk.*

231 STATE OF IOWA,
Shelby County, ss:

I, H. C. Halcomb, clerk of the district court in and for said county, hereby certify that the surety on the within bond is worth the amount therein specified, and if said bond were presented to me I would approve the same.

[SEAL.] H. C. HOLCOMB, *Clerk.*

Bond approved Aug. 13, 1879.

J. M. BECK, *Ch. J.*

232 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Ebenezer Trefey and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened to the great damage of the said Ebenezer Trefey, as by his complaint appears: we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this
233 writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON.
Clerk of the United States Circuit Court for the District of Iowa.

234 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the supreme court of the State Iowa, wherein Ebenezer Trefrey is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said pl't'ff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, chief justice of the supreme court of the State of Iowa, this fifth day of August, in the year of our Lord one thousand eight hundred and seventy-nine.

JOSEPH M. BECK,
Chief Justice Sup. Ct., Iowa.

235 UNITED STATES,
District of Iowa:

DES MOINES, IA., *Sept. 13th*, 1879.

We hereby accept due and legal service of the within citation, and acknowledge receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for the C., R. I. & P. R. Co.

236 Know all men by these presents, that we, Ebenezer Trefry, as principal, and as sureties, are held and firmly bound unto the Chicago, Rock Island and Pacific Railroad Co. in the sum of one hundred dollars, which sum well and truly to be paid to the said C., R. I. & P. R. R. Co., its executors and assigns, *are* hereby bind ourselves firmly by these presents.

The condition of the above obligation is such that whereas the said Ebenezer Trefry had appealed from the judgment or order of the supreme court of the State of Iowa, rendered on the day of , 1879, in an action then pending in said court, wherein the said C., R. I. & P. R. R. Co., now plaintiff, and the said Ebenezer Trefry now defendant:

Now, if the said appellant shall pay to the said appellee all costs and damages that shall be adjudged against said appellant in said
237 appeal, and shall also satisfy or perform the said judgment or order appealed from in case it shall be affirmed and any judgment or order which the United States Supreme Court may render, or order to be rendered, then this obligation to be void, otherwise to be and to remain in full force and virtue.

Witness our hands this 9th day of August, 1879.

E. TREFRY. *Principal.*
WILSON REARMES. *Surety.*

STATE OF IOWA,
Shelby County, ss:

We, , sureties in the above bond, on oath depose and say and each for himself says, that they and each of them are worth the sum of one hundred dollars over and above all property exempt from execution.

238 Subscribed and sworn to before me by F. Trefry & Wilson Rearmes on this the 9th days of August, A. D. 1879.

F. J. McNAUGHTON,
Justice of the Peace in and for Shelby Co., Iowa.

STATE OF IOWA,
Shelby County, ss:

I, H. C. Holcomb, clerk of the district court in & for said county, do hereby certify that F. J. McNaughton, before whom the annexed instrument was proved or acknowledged, was at the time of taking the same a justice of the peace duly and legally qualified and fully authorized to take the same, and that I believe his signature to be genuine.

Witness my hand and the seal of said court at my office, in Harlan, in said county, this 11th day of August, 1879.

[SEAL.] H. C. HOLCOMB,
Clerk Dist. Court.

239 STATE OF IOWA,
Shelby County, ss:

I, H. C. Holcomb, clerk of the circuit court, hereby certify that the surety on the within bond is ample, and if said bond was presented to me I would approve the same.

[SEAL.] H. C. HOLCOMB, *Clerk.*

240 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Violetta Roper and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the right, title, privilege, and exemption claimed under said statutes, a manifest error hath happened, to the great damage of the said Violetta Roper, as by her complaint appears: We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same to the Su-

241 preme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

242 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Violetta Roper is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, chief justice of the supreme court of the State of Iowa, this fifth day of August, in the year of our Lord one thousand eight hundred and seventy-nine.

JOSEPH M. BECK,
Chief Justice Supreme Court Iowa.

243 UNITED STATES,
District of Iowa:

DES MOINES, IA., *Sept.* 13, 1879.

We hereby accept due and legal service of the within citation and acknowledge receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Attorneys for the Chicago Rock Island & Pacific R. R. Co.

244 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between B. H. Lathrop and the Chicago, Rock Island and Pacific Railroad Company, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened, to the great damage of the said B. H. Lathrop, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this
245 writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

246 The United States of America to the Chicago, Rock Island & Pacific Railroad Co., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State Iowa, wherein H. Benj. Lathrop is pl'tiff in error, and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl't'ff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, Ch. J. of the supreme court of the State of Iowa, this 5th day of August, A. D. 1879.

JOSEPH M. BECK,
Ch. Justice Sup. Court Iowa.

247 UNITED STATES,
District of Iowa:

DES MONES, IA., *Sept.* 13, 1879.

We hereby accept due and legal service of the within citation, and acknowledge receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for the C., R. I. & P. R. R. Co.

248 Know all men by these presents that we, B. H. Lathrop, as

principal, and Wm. H. Griffith and Martin Poling, as sureties, are held and firmly bound unto the Chicago, Rock Island & Pacific R. R. Co. in the sum of one hundred dollars, which sum, well and truly to be paid to the said C., R. I. & P. R. R. Co., its executors and assigns, we hereby bind ourselves firmly by these presents.

The condition of the above obligation is such that whereas the said B. H. Lathrop has appealed from the judgment or order of the supreme court of the State of Iowa, rendered on the day of , A. D. 18 , in an action then pending in said court, wherein the said C., R. I. & P. R. R. Co. was pl'tff and the said B. H. Lathrop was defendant:

Now, if the said appellant shall pay to the said appellee all costs and damages that shall be adjudged against said appellant on said appeal and shall satisfy or perform the said judgment or order ap-
249 pealed from, in case it shall be affirmed, and any judgment or order which the United States Supreme Court may render or order to be rendered, then this obligation to be void, otherwise to be and to remain in full force and virtue.

Witness our hands this 9th day of August, A. D. 1879.

B. H. LATHROP.
Prin.
WM. H. GRIFFITH,
MARTIN POLING,
Sureties.

STATE OF IOWA,
Shelby County, ss:

We, Wm. H. Griffith and Martin Poling, sureties in the above bond, on oath depose and say, and each for himself says that they and each of them are worth the sum of one hundred dollars over and above all property exempt from execution.

WM. H. GRIFFITH.
MARTIN POLING.

Subscribed & sworn to before me by Wm. H. Griffith and Martin Poling this 9th day of Aug., 1879.

[SEAL.] H. C. HOLCOMB, *Cl.*

250 STATE OF IOWA,
Shelby County, ss:

I, H. C. Holcomb, clerk of the district court in and for said county, hereby certify that the surety on the within bond is worth the amount therein specified, and if the same were presented to me I would approve the same.

[SEAL.] H. C. HOLCOMB,
Clerk.

Bond approved Aug. 13, 1879.

J. M. BECK, *C. J.*

251 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said supreme court before you, or some one of you, being the highest court of law or equity of the said

State in which a decision could be had in the said suit between John Bruce and John Tomlinson, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened, to the great damage of the said , as by complaint appears: we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States,
252 together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1870.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

253 The United States of America to Joseph Tomlinson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein John Bruce is pl'ff in error, and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl'ff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph M. Beck, chief justice of the supreme court of the State of Iowa, this fifth day of August, in the year of our Lord one thousand eight hundred and seventy-nine.

JOSEPH M. BECK.
Chief Justice Supreme Court Iowa.

254 UNITED STATES,
District of Iowa:

DES MOINES, IOWA,
Sept. 13th, 1879.

I hereby accept due and legal service of the within citation, and acknowledge receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'y' for the C., R. I. & P. R. R. Co.

255 Know all men by these presents that we, John Bruce, as principal, and A. B. Houston, as surety, are he d and firmly bound unto Joseph Tomlinson in the penal sum of one hun red (100) dollars, for the payment of which, well and truly to be paid, we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators. Sealed with our seals, and dated this eleventh day of Aug., A. D. 1879.

The condition of the above obligation is such that, whereas a writ of error has been allowed from the Supreme Court of the United States to

the supreme court of the State of Iowa as authorized by law and in the manner provided by law in the case of Joseph Tomlinson vs. John H. Bruce, removing said cause to the Supreme Court of the United States:

Now, therefore, if the said John Bruce shall prosecute his said
256 writ of error to effect, or if he fail to make his plea good, shall answer all damages and costs sustained by the said Joseph Tomlinson, and perform all things requisite therein according to the law and practice of the United States and its courts, then these presents and obligation shall be void, otherwise to remain in full force.

Exira, Aug. 11th, 1879.

JOHN H. BRUCE.
A. B. HOUSTON.

STATE OF IOWA,
Audubon Co.:

A. B. Houston of said county, being duly and severally sworn, say and each for himself says that he is one of the sureties named in the foregoing bond; that he is a resident of the State of Iowa, and that he is worth the sum of two hundred dollars beyond the amount of his debts, and that he has property liable to execution in this State equal to one hundred dollars.

A. B. HOUSTON.

257 Subscribed and sworn to before me by A. B. Houston Aug. 11, 1879.

[SEAL.] FRANK P. BRADLEY,
Clerk Dist. Court.

I hereby certify that in my opinion the surety in the foregoing bond is amply good & sufficient, and the same would be approved by me. Aug. 11, 1879.

FRANK P. BRADLEY,
Clerk D. C.

Bond approved Aug. 13, 1879.

J. M. BECK, *Ch. J.*

258 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between S. B. S. Duncan and John Tomlinson, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened, to the great damage of the said , as by complaint appears: We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States,
259 together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings afore

said being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

260 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein S. B. S. Duncan is pl't'ff in error and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl't'ff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, ch. j. of the supreme court of the State of Iowa, this 5th day of August, A. D. 1879.

JOSEPH M. BECK,
Chief Justice Supreme Court Iowa.

261 UNITED STATES,
Dist. of Iowa:

DES MOINES, IA.,
Sept. 13, '79.

We hereby accept due & legal service of the within citation, and acknowledge receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for the C., R. I. & P. R. R. Co.

262 Know all men by these presents that we, Stafford Duncan, as principal, and A. Hammond and R. C. Carpenter, as sureties, are held and firmly unto Joseph Tomlinson, in the penal sum of one hundred (100) dollars, for the payment of which well and truly to be paid, we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators. Sealed with our seals and dated this 11th day of August, A. D. 1879.

The condition of the above obligation is such, that whereas a writ of error has been allowed from the Supreme Court of the United States to the supreme court of the State of Iowa, as authorized by law, and in the manner provided by law, in the case of Joseph Tomlinson vs. S. Duncan, removing said cause to the Supreme Court of the United States:

Now, therefore, if the said Stafford Duncan shall prosecute his
263 said writ of error to effect, *or* if he fail to make his plea good shall answer all damages and costs sustained by the said Joseph Tomlinson, and perform all things requisite therein according to the law and practice of the United States and its courts, then these presents and obligation shall be void; otherwise to remain in full force.

Exira, Aug. 11th, 1879.

his
STAFFORD + DUNCAN.
mark.
A. HAMMOND.
R. C. CARPENTER.

STATE OF IOWA,
Audubon County:

We, A. Hammond & R. C. Carpenter, of said county, being duly and severally sworn, say, and each for himself says, that he is one of the sureties in the foregoing bond; that he is a resident of the State of Iowa, and that he is worth the sum of two hundred dollars beyond the
264 amount of his debts, and that he has property liable to execution in this State equal to one hundred dollars.

A. HAMMOND.
R. C. CARPENTER.

Subscribed and sworn to before me and in my presence by said A. Hammond and R. C. Carpenter, this eleventh day of August, 1879.

[SEAL.] FRANK P. BRADLEY,
Clerk Dist. Court.

I hereby certify that in my opinion the sureties in the foregoing bond are amply good and sufficient, and the same would be approved by me.

FRANK P. BRADLEY, *Clerk.*

Bond approved Aug. 13, 1879.

J. M. BECK, *C. J.*

265 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you or some one of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Wm. Bruce and John Tomlinson, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption claimed under said statutes, a manifest error hath happened to the great damage of the said as by complaint appears: We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with
266 this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of September, A. D. 1879.

[SEAL.] EDWARD R. MASON,
Clerk of the United States Circuit Court for the District of Iowa.

267 The United States of America to the Chicago, Rock Island & Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Wm. Bruce is pl'tff in error, and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl'tff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, chief justice of the supreme court of the State of Iowa, this fifth day of August, in the year of our Lord one thousand eight hundred and seventy-nine.

JOSEPH M. BECK,
Chief Justice Supreme Court, Iowa.

268 UNITED STATES,
District of Iowa:

DES MOINES, IOWA,
Sept. 13th, 1879.

We hereby accept due and legal service of the within citation and acknowledge receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for the C., R. I. & P. R. Co.

269 Know all men by these presents, that we, William A. Bruce, as principal, and R. C. Carpenter, as surety, are held and firmly bound unto Joseph Tomlinson in the penal sum of one hundred (100) dollars, for the payment of which well and truly to be paid we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators. Sealed with our seals and dated this eleventh day of August, A. D. 1879.

The condition of the above obligation is such that whereas a writ of error has been allowed from the Supreme Court of the United States to the supreme court of the State of Iowa as authorized by law and in the manner provided by law in the case of Joseph Tomlinson vs. Wm. A. Bruce, removing said cause to the Supreme Court of the United States,

Now therefore, if the said Wm. A. Bruce shall prosecute his
270 writ of error to effect, or if he fail to make his plea good, shall answer all damages and costs sustained by the said Joseph Tomlinson and perform all things requisite therein according to the law and practice of the United States and its courts then these presents and obligation shall be void; otherwise to be in full force.

Exira, Aug. 10, 1879.

W. A. BRUCE.
R. C. CARPENTER.

STATE OF IOWA,
Audubon, Co, ss:

R. C. Carpenter, of said county, being duly and severally sworn, say, and each for himself says, that he is one of the sureties named in the foregoing bond, that he is a resident of the State of Iowa, and that he is worth the sum of two hundred dollars beyond the amount of his debts, and that he has property liable to execution in this State equal to one hundred dollars.

R. C. CARPENTER.

271 Subscribed and sworn to before me, and in my presence, by said R. C. Carpenter, this 11th day of August, 1879.

[SEAL.] FRANK P. BRADLEY,
Clerk Dist. Court.

I hereby certify that in my opinion the surety in the foregoing bond is amply good and sufficient and the same would be approved by me. Aug. 11th, 1879.

FRANK P. BRADLEY,
Clk D. C.

Bond approved Aug. 13th, 1879.

J. M. BECK, *Ch. J.*

272 Know all men by these presents, that we Matthias Gabel as principal, and Peter Thornish as surety, are held and firmly bound unto Jacob Mundy in the penal sum of one hundred (100) dollars, for the payment of which well and truly to be paid we do hereby jointly and severally bind ourselves, our heirs, executors and administrators. Sealed with our seals, and dated this 11th day of August, A. D. 1879.

The condition of the above obligation is such that whereas a writ of error has been allowed from the Supreme Court of the United States to the supreme court of the State of Iowa, as authorized by law, and in the manner provided by law in the case of Jacob Mundy vs. Matthias Gabel, removing said cause to the Supreme Court of the United States,

Now, therefore, if the said Matthias Gabel shall prosecute his said writ of error to effect, or if he fail to make his plea good, shall
273 answer all damages and costs sustained by the said Jacob Mundy and perform all things requisite therein according to the law and practice of the United States and its courts, then these presents and obligations shall be void; otherwise to remain in full force.

Exira, Iowa, Aug. 11, 1879.

MATTHIAS GABEL.
PETER THORNISCH.

STATE OF IOWA.
Audubon County:

Peter Thornisch, of said county, being duly sworn, says that he is one of the sureties named in the foregoing bond; that he is a resident of the State of Iowa, and that he is worth the sum of two hundred dollars beyond the amount of his debts, and that he has property liable to execution in this State equal to one hundred dollars,

PETER THORNISCH.

Subscribed and sworn to before me, and in my presence, by said this 11th day of Aug., 1879.

[SEAL.] FRANK P. BRADLEY,
Clerk Dist. Court.

274 I hereby certify that in my opinion the surety in the above bond is amply good and sufficient and the same would be approved by me. Aug. 11th, 1879.

FRANK P. BRADLEY.

Bond approved Aug. 13, 1879.

J. M. BECK, *Ch. J.*

275 Know all men by these presents that we, John Bruce, as principal, and A. B. Houston, as surety, are held and firmly bound unto the Chicago, Rock Island and Pacific Railroad Company in the penal sum of one hundred (100) dollars, for the payment of which, well

and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors, and administrators, sealed with our seals, and dated this 7th day of August, A. D. 1879.

The condition of the above obligation is such that whereas a writ of error has been allowed from the Supreme Court of the United States to the supreme court of the State of Iowa, as authorized by law and in the manner provided by law, in the case of the Chicago, Rock Island and Pacific Railroad Company vs. John Bruce, removing said cause to the Supreme Court of the United States:

276 Now, therefore, if the said John Bruce shall prosecute his said writ of error to effect, or, if he fail to make his plea good, shall answer all damages and costs sustained by the said Chicago, Rock Island and Pacific Railroad Company, and perform all things requisite therein, according to the law and practice of the United States and its courts, then these presents and obligation shall be void; otherwise to remain in full force.

JOHN BRUCE.
A. B. HOUSTON.

STATE OF IOWA,
Audubon County, ss:

We, , of said county, being duly and severally sworn, say, and each for himself says, that he is one of the sureties named in the foregoing bond; that he is a resident of this State, and that
277 he is worth the sum of two hundred dollars beyond the amount of his debts, and that he has property liable to execution in this State equal to one hundred dollars.

A. B. HOUSTON.

Subscribed and sworn to before me and in my presence by said A. B. Houston this 7th day of August, A. D. 1879.

[SEAL.] FRANK P. BRADLEY,
Clerk of District Court, Audubon Co., Iowa.

I hereby certify that the surety on the above bond is amply good and sufficient in my judgment, and said bond would be approved by me.

Exira, Aug. 7th, 1879.

FRANK P. BRADLEY, *Clerk,*

The foregoing bond is approved Aug. 13th, 1879.

J. M. BECK,
Chief Justice.

278 The United States of America to the Chicago, Rock Island and Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein John Bruce is plaintiff in error and you are def't in error, to show cause, if any there be, why the judgment rendered against the said pl'ff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. J. M. Beck, c. j. of the supreme court of the State of Iowa, this fifth day of August, in the year of our Lord one thousand eight hundred and seventy-nine.

JOSEPH M. BECK,
C. J. Sup. C't Iowa.

279 UNITED STATES,
District of Iowa:

DES MOINES, IA., *Sept.* 13*th*, 1879.

We hereby accept due and legal services of the written citation, and acknowledged the receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for the C., R. I. & P. R. R. Co.

280 UNITED STATES,
District of Iowa:

DES MOINES, IOWA, *Sept.* 12*th*, 1879.

We hereby accept due and legal service of the within citation, and acknowledge receipt of a copy thereof.

WRIGHT, GATCH & WRIGHT,
Att'ys for the C., R. I. & P. R. Co.

281 I, E. J. Holmes, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a full, true, and complete copy of the abstract of record, amendment to said abstract, additional and supplemental abstract of record, copy of opinion, and record entries in said court in the above-entitled cause; also, the petition for writs of error, the citations, with acceptance of service, and bonds, as well as the original writs of error in the above-entitled cause, as full, true, and complete as the same remains on file and of record in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court this 24th day of September, A. D. 1879.

E. J. HOLMES,
Clerk of the Supreme Court of Iowa.

Fees, $28.50, paid by A. L. Bell.

(Indorsement on cover:) No. 683. George W. Grinnell et al., plaintiffs in error, vs. The Chicago, Rock Island & Pacific Railroad Company, Charles Stuart, and John Tomlinson. Iowa sup. ct. Filed 3rd November, 1879.

Supreme Court of the United States.

October Term, A. D. 1880.

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No. 683.

———:o:———

GEORGE W. GRINNELL AND 23 OTHERS,

Plaintiffs in Error.

VS.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, CHARLES STEWART AND JOSEPH TOMLINSON,

Defendants in Error.

———:o:———

Error to the Supreme Court of the State of Iowa.

———:o:———

S. S. HENKLE *and*
JOHN S. HAUKE,
Counsel for Plaintiffs in Error.

Supreme Court of the United States.

October Term, A. D. 1880.

GEORGE W. GRINNELL,
Plaintiff in Error,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Defendant in Error.

No. 683.

H. P. EMERY, JOHN ROBINSON, JOSEPH THARNISH, MARY L. Bruce, A. Hammond, S. E. Ogborn, E. E. Ogborn, George Ulrich, Johh Slater, Jacob Weakline, Lydia Dunham, Andrew Wilfong, Ed. Penniston, George Darling, A. L. Bell, Chas. Brown, Ebenezer Trefrey, Violetta Roper and H. B. Lathrop, severally Plaintiffs in Error,

vs.

THE SAME, Defendant in Error.

W. D. PACKARD, Plaintiff in Error,

vs.

CHARLES STEWART, Defendant in Error.

JOHN BRUCE, S. B. S. DUNCAN AND WM. BRUCE, SEVERALLY Plaintiffs in Error,

vs.

JOSEPH TOMLINSON, Defendant in Error.

Error to the Supreme Court of the State of Iowa.

The above cases were tried in the lower courts of Iowa as

twenty-four separate and distinct cases, but by stipulation of parties were docketed in the Supreme Court of that State as one case, and submitted to the Court upon a consolidated record and upon the same arguments. (Vide, Stipulation Record, pp. 31 and 33.)

STATEMENT OF THE CASE.

The only question presented in these cases by the record is, whether the Chicago, Rock Island and Pacific Railroad Company, under the grant made by Congress to the State of Iowa, on the 15th of May, 1856, (U. S. Stats., 9) has acquired title to any lands within the old fifteen mile limits of the Mississippi and Missouri Railroad Company, certified to the State of Iowa under said grant by the Department of the Interior, for the benefit of said company, but which were left outside of the new twenty-mile limits by a change in the location of the old line made by the Chicago, Rock Island and Pacific Railroad Company under the act of Congress approved June 2, 1864, (13 U. S. Stats., 95) amendatory of the grant of May 15, 1856.

No other question is presented in the record although the claims of four of the appellants are within the new twenty-mile limits; two of them upon odd numbered and two upon even numbered tracts, and 120 acres of the lands outside of the new twenty-mile limits, (claimed by Charles Brown, No. 18,) belong to an even section and are not embraced in any grant.

The lands claimed by nineteen of the appellants and forty acres claimed by Charles Brown, outside of the new twenty-mile limits, and within the old fifteen-mile limits of the Mississippi and Missouri Railroad Company, together with the claims of Ebenezer Trefrey and Violetta Roper, (Nos. 19 and 20) belonging to an odd-numbered section within the new twenty-mile limits, were certified in December, 1858, by the Department of the Interior for the benefit of said last-named company, under the grant of May 15, 1856.

The lands claimed by H. P. Emery and Joseph Tharnish,

(Nos. 2 and 4) within the new twenty-mile limits, and 120 acres claimed by Charles Brown outside of said limits, being parts of even sections, were not embraced in the grant of 1856.

HOW THE QUESTION AROSE.

After Congress by the act of May 15, 1856, had granted lands to the State of Iowa to aid in the construction of railroads, the General Assembly of that State by an act approved July 14, 1856, regranted the lands to several railroad companies, one of them being the Mississippi and Missouri Railroad Company, which latter company thereupon proceeded to locate a route from the city of Davenport, on the Mississippi River, through Iowa City and Fort Des Moines, to Council Bluffs on the Missouri River, and to construct about 130 miles of the road from Davenport westward to the town of Kellogg in Jasper County, when that company became insolvent and unable to construct any more of the road.

Prior to its insolvency it had, under a supplemental act of the General Assembly of Iowa, approved January 28, 1857, executed certain mortgages or deeds of trust upon its railway stations, depot lands, rolling stock, and its interest in the land grant made by Congress in the act of May 15, 1856. These mortgages were foreclosed in May, 1866, in the U. S. Circuit Court for the District of Iowa, and the interests of said company, including its interest in said land grant, were ordered to be sold, and the same were subsequently sold to the Chicago, Rock Island and Pacific Railroad Company of Iowa, and were conveyed to that company by a special master in chancery in August, 1866, the said conveyances including the odd-numbered tracts in controversy in these cases.

During the same month of August, 1866, said last-named company consolidated its interests with the Chicago and Rock Island Railroad Company of Illinois, under the corporate name of the Chicago, Rock Island and Pacific Railroad Company, which latter company having acquired all the rights and interests of the Mississippi and Missouri Railroad Company

and of the mortgagees, commenced the construction of the road from Kellogg westward to Council Bluffs, completing the same in June, 1869. It did not, however, construct the road upon the line as located by its predecessor but upon a changed location made by itself under the authority conferred in the first section of the act of Congress approved June 2, 1864; the new location from range 34 to range 39 diverging so far south of the original line, located under the grant of 1856, as to leave outside of the new twenty-mile limits located under the amendatory grant of 1864, some of the lands within the old fifteen-mile limits north of the old line, which had been certified by the Department of the Interior under the grant of 1856.

All the odd-numbered tracts in controversy belong to lands thus excluded from the new limits excepts the tracts claimed by Trefrey and Roper (Nos. 19 and 20) which are within the new limits.

Some time in 1872, it having then become generally known that the road had been constructed upon a route so remote from the old line at certain points as to leave outside of the amended limits some of the lands included within the original limits, the appellants selected the lands in controversy and entered into possession of the same with the view of appropriating them under the pre-emption and homestead laws of the United States, and have ever since resided upon, improved and cultivated the same; four of the appellants, however, it was discovered had entered upon lands inside of the amended limits, two of them upon an odd numbered and two upon an even numbered section, and one of the appellants claiming lands outside of the amended limits had included in his claim 120 acres of an even section.

About the same time that applications were being made to enter under the homestead laws the lands excluded from the amended limits, the Chicago, Rock Island and Pacific Railroad Company had a bill presented in Congress to confirm to itself and to its predecessor, the Mississippi and Missouri Railroad Company, the title to all lands previously certified and ap-

proved by the Department of the Interior for the benefit of these companies, which bill became a law on the 31st of January, 1873, without the President's approval, but with an amendment excluding from its operation all lands settled upon in good faith and occupied at the date of the act by homestead or pre-emption settlers. (17 U. S. Stats., 421, and Record, pp. 50 and 51.)

In August, 1877, the Chicago, Rock Island and Pacific Railroad Company commenced proceedings in the nature of actions of ejectment against George W. Grinnell and nineteen other appellants in the courts of Shelby, Audubon and Crawford counties; and Charles Stewart and Joseph Tomlinson, purchasers from said company, commenced similar proceedings against the four remaining appellants; the said company, Stewart and Tomlinson, basing their claim of title to the lands in contest, upon the Congressional grant of May 15, 1856; the act of the General Assembly of Iowa of July 14, 1856, regranting lands to the Mississippi and Missouri Railroad Company, and the subsequent proceedings detailed above.

The defendants in the courts below, plaintiffs in error here, severally denied that any title had been acquired by the plaintiffs below to the lands in controversy; insisting that they were public lands subject to homestead and pre-emption under the laws of the United States; that each of said defendants was a qualified settler under such laws; that each, in good faith, had settled upon the land claimed by him prior to the date of the confirmatory act of Congress of January 31, 1873, (Record, pp. 50 and 51,) and was occupying the same at the date of said act with the view of appropriating it under the homestead or pre-emption laws of the United States.

THE EVIDENCE INTRODUCED.

To sustain their cause and trace title to themselves through grants made by Congress for railroad purposes, the plaintiffs in the Circuit Courts of the State introduced as evidence;

The grant made by Congress to the State of Iowa on the 15th of May, 1856; the grant made by the General Assembly

of the State of Iowa on the 14th of July, 1856, regranting to the Mississippi and Missouri Railroad Company a portion of the lands embraced in the Congressional grant; the supplemental act of the General Assembly of Iowa, approved January 28, 1857, authorizing the execution of mortgages or deeds of trust upon the lands granted by the preceding act; copies of the mortgages executed by the company; of the decree of foreclosure and deeds executed by the special master in chancery; map of the route located by the Mississippi and Missouri Railroad Company in 1856 and 1857, showing the lands in controversy to be within fifteen miles of the same; map showing the same line and also the line on which the road was finally built west of Kellogg, (Record, top of page 21;) list of lands certified to the State of Iowa for the benefit of the Mississippi and Missouri Railroad Company, by the Department of the Interior, under the grant of May 15, 1856, in December 185[illegible], embracing the odd section lands in controversy; copy of the act of the General Assembly of Iowa, approved February 11, 1868, regranting to the Chicago, Rock Island and Pacific Railroad Company all right or interest the State then had in the lands previously granted to the Mississippi and Missouri Railroad Company, together with the correspondence and proceedings had in relation to said statutes and grants, admitted by the courts below against the objection of the defendants below. Also the act of Congress approved June 2, 1864, amendatory of the grant of 1856. (See Record, pp. 15 to 21.) No evidence was introduced by plaintiffs below showing any such certification and conveyance of land under said act of June 2, 1864, as are authorized to be made by section 2 of said act; nor did they introduce as evidence the confirmatory act of January 31, 1873.

On the part of the defendants below there was introduced as evidence the confirmatory act of January 31, 1873, (17 U. S. Stats., 421; Record 50 and 51;) the homestead act of May 20, 1862, (12 U. S. Stats., 392;) evidence of personal qualifications under the pre-emption and homestead laws of the United States, actual settlement and residence upon the lands

prior to and at the date of the above-named confirmatory act, with the bona fide intention of acquiriug title to the lands under the homestead and pre-emption laws; and the fact that the lands claimed by twenty of the defendants below were outside of and beyond the amended twenty-mile limits as located under the amendatory act of June 2, 1864; that the road was completed in 1869; that at the date of the act of June 2, 1864, the road was completed to Kellogg, about 130 miles west of Davenport and about 150 miles east of Harlan, the county seat of Shelby County; that Kellogg still remained the terminus of the completed part of the road in 1866, when the mortgages were foreclosed and the Chicago, Rock Island and Pacific Railroad Company became the purchaser of all the interests, rights and claims of the Mississippi and Missouri Railroad Company and of the mortgagees; that the line of the road was modified and changed under the amendatory act of June 2, 1864, after the forclosure and sale made in 1866. Also that 120 acres of the land claimed by Charles Brown, one of the defendants below, belong to an even section outside of and beyond the amended limits. (Record, pp. 21 and 22.)

Which testimony being submitted the court instructed the jury in each case to return a verdict for the plaintiff below, which was accordingly done; whereupon the court entered judgment in each case for the plaintiff below, deciding the title to the land to be in such plaintiff and ordering the necessary writ to issue to put it in possession with costs of suit.

Thereafter the cases were duly appealed to the Supreme Court of Iowa, docketed in said court as one case, and submitted upon a consolidated record; and at the June term, 1879, of said court the judgment of the court below was affirmed. (Record, pp. 42 to 47.)

Writs of error were duly allowed bringing the cases into this court.

ASSIGNMENT OF ERRORS.

1. The court erred in holding (Record, pp. 45 and 46, Division III) that the old line located by the Mississippi and

Missouri Railroad Company continued to be a *definitely fixed* line west of Kellogg, notwithstanding it was abandoned as a line for the construction of the road, the latter having been constructed upon another route.

2. The court erred in holding that the grant made by Congress on the 15th of May, 1856, could be located by an abandoned line, the road contemplated by that grant having been constructed upon another and different line.

3. The court erred in holding that under the Congressional and State grants of 1856, the location of a line and filing a map of the same in the proper department had the effect of vesting in the Mississippi and Missouri Railroad Company a title to lands within six miles of such line.

4. The court erred in holding that after the location of the original line had been modified and changed west of Kellogg under the amendatory act of June 2, 1864, the line continued thereafter nevertheless to be *definitely fixed* in its original location, the same as if no modification or change had been made under said last-named act.

5. The court erred in holding that by the location of a line and the selection of the indemnity lands, the grantee of the State acquired a valid and certain interest in the identical lands designated by such line and selections, subject to be forfeited or defeated thereafter for failure to construct the road.

6. The court erred in holding that under the grant of May 15, 1856, the construction of the road is in the nature of a condition *subsequent* in the matter of acquiring title to the granted lands.

7. The court erred in holding that under the Congressional and State grants of 1856, the title acquired by the grantee of the State was a defeasible or conditional title.

8. The court erred in assuming that the position and claim of the defendants below involved an assault upon vested rights; or that to sustain their claim it was necessary to assume that the amendatory act of June 2, 1864, made such an assault.

9. The court erred in holding that subsequent State and Congressional legislation recognizes the title of plaintiff below, defendant in error here, to the lands in controversy.

10. The court erred in making no discrimination in respect to the even numbered sections involved in the controversy; and by virtually deciding that the location of a line and the selection of indemnity lands under the grant of 1856, had the effect of vesting in the grantee of the State a title to *even* as well as *odd* section lands.

ARGUMENT FOR PLAINTIFFS IN ERROR.

The lands in controversy are located in the counties of Audubon, Shelby and Crawford, more than a hundred miles west of Kellogg, within fifteen miles of the old line located by the Mississippi and Missouri Railroad Company under the Congressional grant of May 15, 1856, and the State grant of July 14, 1856; but more than twenty miles from the modified route located by the Chicago, Rock Island and Pacific Railroad Company, the defendant in error, under the amendatory act of June 2, 1864, upon which the road has been constructed; excepting the lands claimed by four of the plaintiffs in error, which are found to be within twenty miles of said route. The lands all belong to odd-numbered sections except the lands claimed by three of the plaintiffs in error, which are found to belong to even-numbered sections, two within and one outside of the new twenty-mile limits.

The controversy arose from the Chicago, Rock Island and Pacific Railroad Company modifying and changing the location of the old line so far south of its original position that the north twenty-mile limit of new location failed to extend as far as the north fifteen mile limits of the old location, leaving some of the lands within the latter outside of the former.

Regarding the lands left outside of the new limits as disencumbered of any claim under the grant of 1856, the plaintiffs in error entered into possession of the tracts in controversy with the view of appropriating them under the pre-emption and homestead laws of the United States, and are now

threatened with eviction from lands they have resided upon, cultivated and improved during the last eight years, by proceedings in the State courts of Iowa, based as the plaintiffs in error contend, upon erroneous and unjust constructions of acts of Congress granting lands for railroad purposes.

The defendants in error claim the lands under the Congressional grant of May 15, 1856, and the proceedings had thereunder including the acts of the General Assembly of Iowa. All the evidence they have submitted relates to this act and the proceedings under it, excepting that they have filed as evidence the amendatory act of June 2, 1864, and a map showing the new route located under that act and upon which the road has been constructed; but have not submitted any evidence tending to show the acquisition of title to lands under the last-named act, nor under any other act except that of May 15, 1856.

Hence the only question made by the record is, whether title to the lands in controversy has been acquired by defendants in error under and through the Congressional grant of the last-named date, and the proceedings incident to it, as set out in the record; and in maintaining the affirmative of this proposition the burden is upon the defendants in error who must stand upon their own title, or fail from want of one. They cannot avail themselves of any want of title in the plaintiffs in error.

The latter contend that while they have not as yet acquired the title to their respective tracts, that Congress nevertheless recognized their claims in the confirmatory act of January 31, 1873, the lands covered by their claims being expressly excepted from confirmation as railroad lands.

They further state that in the act of June 15, 1878, (20 U. S. Stats., 133; Record, p. 51,) to restore certain lands in Iowa to settlement under the pre-emption and homestead laws, and for other purposes, Congress has directly recognized the right of the plaintiffs in error to enter the lands respectively occupied by them in preference to any other applicants, in the event of its being determined that they are vacant and unap-

propriated which, it is conceded they are, if not covered by the present claim of the defendants in error.

The plaintiffs in error contend that there is nothing in the record that shows any title in the defendants in error; nothing that gives them any right to interfere with the claims of the plaintiffs in error, and nothing to authorize the State courts of Iowa to issue writs of ejectment to evict them from the lands they have settled upon with the view of appropriating them under the pre-emption and homestead laws of the United States; and in support of this position they submit for the consideration of this court the following propositions, to wit:

1. That the old line located by the Mississippi and Missouri Railroad Company under the grant of 1856, so far as the same has been abandoned west of Kellogg, as a line to construct the road upon, is not a *definitely fixed* line within the meaning of the Congressional granting act of May 15, 1856, and no rights under that grant can be based upon it.

This is obvious from the consideration that the only line contemplated by that act is the one upon which the road provided for by the grant would be constructed. No other line comes within the intent and purpose of the statute, or can have any *status* under its provisions.

It is further manifest from the clear meaning of the words. If the expression "definitely fixed," does not mean that every thing has been done necessary to secure a line upon which to construct the road, it means nothing at all. To fix a line, signifies to give it a fast and stable position from which it shall not be moved. To *definitely fix* it, signifies that all matters entering into the question of fixing its position have been finally settled and determined. This is the ordinary meaning of the words and whoever contends that they have a different meaning in the statute under consideration is bound to show that fact from the statute itself.

Finally, it is manifest that an *abandoned* line cannot be *definitely fixed* within the meaning of the act of May 15, 1856, from the fact that such a line cannot meet the requirements

of that act, which in plain and explicit terms locates the granted lands within six miles of the *road* aided by the grant, and the indemnity lands, within fifteen miles of the *line of the road*. Now as the statute authorizes the selection of indemnity lands when the line is definitely fixed it implies that such a line will render it possible to identify the granted lands; or in other words the lands which, when the road is completed will be found within six and fifteen miles of the same, on either side thereof, and no line will do this except the line upon which the road is afterwards constructed. Hence, an abandoned line is not *definitely fixed* for the triple reason that it does not come within the intent and purpose of the statute; that it does not come within the meaning of the words "definitely fixed;" and does not meet the requirements of the statute in the matter of identifying the granted lands.

The line upon which the road has been constructed comes within all these reasons, and is therefore the only definitely fixed line.

When the road was constructed all the purposes of the statute were realized. It contemplates nothing beyond the completion of the road, and the line upon which the road has been constructed is definitely fixed within its meaning. It may be conceded that, tested by the law of nature, a line may not be *definitely fixed* even after a road has been constructed over it; but the question at issue relates to the law of the *statute* and not to the law of *nature*, and by the former a line is definitely fixed when it realizes all the purposes comtemplated by the statute.

In the language of Attorney General Cushing, in an opinion rendered February 16, 1857, in regard to the lines of the Iowa railroads under the grant of 1856, "definitely fixed implies "fixed without capacity of change; and any change in a line "unfixes what had been fixed; takes away from it the quality "of definiteness; reopens the land to competing purchasers, "and postpones to a future act of fixedness the exclusive rights "of the State." (8 Opp. Attys., 390.)

2. They submit that lands cannot be claimed under the grant

of May 15, 1856, that are not within fifteen miles of a road aided by that grant, for the following reasons:

First, for the reason that the statute locates the granted lands within six and fifteen miles of the road, and does not locate them relatively to a mere line.

Second. Because it locates the granted odd section lands and the double minimum even section lands within precisely the same limits, as appears by comparing sections one and two of the act, so that the location of one class becomes a test as to the location of the other class.

And no one will contend that the even section lands along the abandoned line west of Kellogg and more than six miles from the constructed road, so far as the same remained undisposed of, could have been rated as double minimum lands under the grant of 1856. The alternate even sections which by the grant remain to the United States, are enhanced in value by the statute on account of their proximity to a railroad. If they are not within six miles of a road, they are not enhanced in value; and if they are not *double minimum* lands, the odd-numbered sections alternate to them, are not *granted* lands, for the statute places the two classes equally within six miles of the *road*.

Third. Because the State of Iowa, under the grant of 1856, had no power to sell the granted lands irrespectively of the construction of the road. The act expressly provided that the granted lands should be sold by the State *only* from time to time as the construction of the road progressed in sections of twenty miles each, and that the lands embraced in each sale should be included within a continuous length of twenty miles of the *road*. This court has explicitly decided that under a grant like that of May 15, 1856, the State has no power to dispose of the granted lands otherwise than from time to time as the construction of the road progresses; that the granting act makes the construction of twenty miles of the road a condition *precedent* to each sale made by the State, after the initial sale; and that no title would pass to the grantee of the State by any attempted conveyance in violation of these conditions.

(Schulenberg *vs.* Harriman, 21 Wallace, 59.) Now as the State could only sell the lands from time to time as the road was constructed, and as the lands embraced in each sale had to be included within a continuous length of twenty miles of the *road*, it is not possible that lands along an abandoned line, upon which no road has ever been constructed, or is ever intended to be, can come within the terms and conditions of the grant.

The State made its grant on the 14th of July, 1856, before the line of the road was surveyed. Under that grant the title to the granted lands would vest in the States' grantee from time to time as the lands became subject to sale under the conditions of the Congressional grant, without any further act of sale on the part of the State. The title to the lands embraced in the initial sale vested in the Mississippi and Missouri Railroad Company *in presenti*, from the date of the grant, although the lands were then unlocated. When twenty miles of the road were constructed the title to another quantity of lands not exceeding 120 sections, and included within a continuous length of twenty miles of the road, vested in the company, because such an additional quantity then became subject to sale under the conditions of the Congressional grant; and so from time to time as each twenty-mile section of the road was completed, the title would vest in the State's grantee to a corresponding division of the granted lands, under the operation of the State grant, without any further act of sale on the part of the State. The quantity of land embraced in any one sale could not exceed 120 sections. Neither could it exceed the amount of unappropriated odd numbered tracts found in a twenty mile division, no matter how small the quantity might be. Hence under the operation of the State grant the Mississippi and Missouri Railroad Company acquired title to the granted lands only from time to time as the construction of the road progressed and only in such quantities as might be included in the respective twenty mile lengths of road becoming subject to sale from time to time; not exceeding in any twenty mile length, the maximum quantity of 120 sections of land.

The Mississippi and Missouri Railroad Company before it became insolvent had completed about 130 miles of the road, from Davenport to Kellogg. Seven divisions of the granted lands, each twenty miles in length, had become subject to sale in regular succession and being subject to sale under the conditions of the Congressional grant, the lands embraced in such divisions assumed successively the *status* of *sold* lands under the operation of the State grant, and the title to the same became vested in the Mississippi and Missouri Railroad Company as the grantee of the State.

When the 130 miles of road had been completed the odd section lands within six miles of the same, not previously disposed of, were *granted* lands within the express words of the statute. They formed part of the grant, and belonged either to the State of Iowa or to its grantee, as the United States had parted with the title to them when it made the grant. But they did not belong to the State if they had become subject to sale under the Congressional grant for the State had parted with its title to all lands that had become subject to sale under that grant. And certainly there can be no doubt that the lands on either side of the completed road had become subject to sale, because in respect to such lands all the conditions of the grant had been met, and nothing remained to be done to transfer an indefeasible title to the same. Hence it follows that the title to the lands on either side of the 130 miles of completed road had become vested in the Mississippi and Missouri Railroad Company under the operation of the State grant. Of the seven divisions that had become subject to sale six divisions and a half had become located by the completion of 130 miles of the road. The lands embraced in these six divisions and a half had been earned by the construction of the road. The consideration had been rendered and the company that completed the 130 miles of road had acquired an indefeasible title to the granted lands lying on either side of the same

This principle is supported by the decision rendered by this court in Tucker *vs.* Ferguson, 22 Wall., 527, where under a

Congressional grant similar to that of May 15, 1856, the title to lands along the completed part of a road was held to have vested in the railroad company under the operation of a State grant similar to the Iowa grant of July, 1856, rendering the lands subject to taxation by the State as the private lands of the company, while the title to the lands along the uncompleted part of the line was held to be simply inchoate; signifying that in regard to the latter the company merely had the right *to acquire* the title by constructing the road over the line.

When the Mississippi and Missouri Railroad Company had completed the road to Kellogg its title was precisely of the same nature. So far as the road had been completed the lands on either side of the same had become the private property of the company by an indefeasible title; but along the uncompleted part of the line the company merely had the inchoate right of acquiring title to the dependent lands by constructing the road upon the line.

The road is about 320 miles in length and therefore includes sixteen divisions of the granted lands, each twenty miles in length. When 130 miles had been completed, seven divisions of the granted lands had become subject to sale and had assumed the *status* of *sold* lands; and all excepting a half division had become located by the construction of the road, and had assumed the *status* of private lands. But ~~sixteen~~ 9 divisions remained that had not become subject to sale under the Congressional grant and the lands in these divisions still retained the *status* of *unsold* lands.

To these lands the Mississippi and Missouri Railroad Company had acquired no title as the condition *precedent* had not been complied with. And so far as the road was constructed over another route the condition precedent never was complied with, and no title could be acquired under the original grant. The record shows that west of Kellogg the road was constructed upon a route located under the act of 1864, and that all but four of the claims in controversy are located more than twenty miles from the constructed road. It is wholly impossible, therefore, that title to such lands could be acquired

under the act of 1856, because that act grants lands only within fifteen miles of the road aided by the grant.

The lands embraced in two of the claims within the twenty-mile limits belong to an odd-numbered section, but there is no evidence in the record showing them to be within fifteen miles of the constructed road, and hence there is no evidence to sustain a claim to them under the grant of 1856. The other two claims within the twenty-mile limits belong to an even section, and of course the lands in these cannot be claimed under the grant of 1856, as that grant was limited wholly to odd-numbered sections.

That title could be acquired under the grant of 1856, only from time to time as the road was constructed, was distinctly recognized by the Mississippi and Missouri Railroad Company in the mortgages it executed wherein it grants "all right, title, "interest, claim or demand which said party of the first part "*now has or shall hereafter acquire* in or to all public lands of "the United States granted by the act of Congress approved "May 15, 1856." (Record, pp. 18 and 19.)

The decree of the U. S. Circuit Court rendered in 1866, orders the sale of the "right, title, &c., which said railroad "company *had at the date of said mortgage or has since acquired*, "in and to all public lands of the United States granted by "the act of Congress," &c. (Record, p. 20.)

This was a distinct recognition of the principle announced by this court in Schulenberg *vs.* Harriman and in Tucker *vs.* Ferguson, and is in harmony with the plain language of the statute.

The court below misconstrued the conditions contained in the Congressional grant of 1856 respecting the completion of the road in twenty-mile lengths, upon which the right of sale on the part of the State depended, treating them as conditions *subsequent*, whereas the language of the statute clearly makes them conditions *precedent*, and this court expressly pronounced them such in Schulenberg *vs.* Harriman.

The court below held that the State grant of July 14, 1856, vested in the Mississippi and Missouri Railroad Company a

valid and legal title which took effect upon *all* the lands granted by Congress in aid of that road as soon as the line was located. It further held that the title so acquired by the company was a conditional one subject to be defeated afterwards upon failure to construct the road.

Surely the court erred in thus ruling. It is not possible by any fair construction to make conditions *subsequent* out of those found in section 4 of the Congressional grant of 1856; nor is there anything in the statute to support the theory that the title acquired by the grantee of the State was a defeasible one. The grantee could acquire title only to such lands as the State had a legal right to sell; and the title acquired under a legal sale was an indefeasible and a perfect title, as this court decided in the case of Railroad Company *vs.* Courtright, 21 Wall., 310. In that case the Iowa Central Air-Line Railroad Company had made a complete failure in all the conditions of the grant. But as Courtright claimed under the intial sale which the State had the power to make independently of the construction of the road, this court held his title to be indefeasible. The principle is precisely the same in regard to every other sale the State has the power to make. Every legal sale transfers to the purchaser an indefeasible title; and if the State has no power to sell the purchaser acquires no title at all.

It could certainly make no difference to the mortgagees whether the Mississippi and Missouri Railroad Company had merely an inchoate right to acquire title to lands by construct ing the road, or had a defeasible title subject to be defeated by failing to construct the road. In either case the construction of the road determined the value of the mortgage security; and the power of the mortgagees to control the application of the money advanced was the same in one case as the other.

3. The plaintiffs in error submit as a third proposition that when the Chicago, Rock Island and Pacific Railroad Company changed the location of the uncompleted part of the old line, west of Kellogg, under the amendatory act of June 2,

1864, and constructed the road over the same, the old line as located under the grant of 1856 ceased to exist, and became vacated and set aside.

The court below admits that the above-named company changed its route under the amendatory act, and constructed the road upon a new line so far south of the old line that the new twenty-mile limits do not reach as far as the old fifteen-mile limits, leaving a strip of land between the respective limits which at some points is five miles wide. (Record, p. 45, *supra*.)

Attention is called to the fact that the thing done by the company under the amendatory act was not the location of an *additional* line for the act grants no such authority. It simply authorized the company to *modify* or *change* the *location* of the uncompleted portion of the old line. Under this authority the new line is simply the old line transferred to a new location. The old line was located under the grant of 1856. West of Kellogg the location made under the grant of 1856 has been *changed*. Hence, west of Kellogg there is no longer any location under the grant of 1856, except in its changed and modified form, and the new line is the only one that has any legal existence. In contemplation of law there is now no line at all at the place formerly occupied by the old line.

The decision of the court below virtually makes two grants west of Kellogg operating side by side upon two separate and distinct lines. But certainly the act of June 2, 1864, is not susceptible of such a construction. To change the *location* of an existing line is a very different thing from locating an additional line. The act of 1864 authorized the former but did not authorize the latter. The company availed itself of the authority conferred by the act and changed the *location* of the old line, and now insists that the line still remains definitely fixed in its original location, notwithstanding the change. Surely such a position cannot be sustained. Neither can it be maintained that the road west of Kellogg has two *definitely fixed* lines. The statute contemplates but one such line, and that is the line upon which the road is to be constructed.

Surely the line upon which the road has been constructed west of Kellogg is a *definitely fixed* line within the meaning of the statute, for that line meets its purposes and objects, and is the only line that does. But if the line upon which the road has been constructed is a *definitely fixed* one within the meaning of the statute, the original line cannot be a definitely fixed one; otherwise the road would have two definitely fixed lines west of Kellogg. The result, therefore, follows inevitably that by changing the location of the old line, under the authority granted under the act of June 2, 1864, the old location has become vacated and annulled, and together with the old indemnity and granted limits, has wholly disappeared, in contemplation of the statute. Hence, legally speaking, there is now no line outside of the new modified and amended limits; nor are there any limits except those located under the amendatory act. Hence, outside of the new twenty-mile limits, there is nothing to identify lands as being embraced in a grant.

Surely if Congress in passing the act of June 2, 1864, had considered that the grant of 1856 would continue to operate in its original form, outside of the new limits, it would not have authorized a change in the location of the original line. To change the location of the old line if title to the lands on either side of it had become vested under the grant of 1856 would be like removing the monuments and land marks designating the boundaries of an estate, a transaction which Congress would not authorize. The very fact therefore of authorizing the location of the old line to be modified and changed shows conclusively that Congress considered that so far as the change would be made the old location would cease to exist; that the original grant would operate only in its amended form and within the amended limits.

And this idea of the original grant operating only in its amended form so far as the provisions of the act of June 2, 1864, might be availed of, pervades every part of the last-named act. The 4th section of the act distinctly states that the Cedar Rapids and Missouri River Railroad Company shall receive the *same* lands *originally* granted to aid in the con-

struction of its main line, and directs the Secretary of the Interior to cause to be certified and conveyed to the company, these *same* lands within fifteen miles of its original line.

The last proviso of the 4th section provides "that no lands "shall be conveyed to any company or party whatsoever under "the provisions of this act, and *the act amended by this act*, "which have been settled upon and improved in good faith by "a bona fide inhabitant, under color of title derived from the "United States or from the State of Iowa, adverse to the grant "made by this act, or *the act to which this act is an amendment*."

This proviso clearly shows that the lands which the act of June 2, 1864, directs the Secretary of the Interior to cause to be certified and conveyed to the respective companies, were to be in satisfaction of both grants; and that so far as the act of 1864 operated it included the act of 1856; the grant of 1864 being in fact simply the grant of 1856 in its amended form. It further shows that in disposing of the lands under the act of June 2, 1864, Congress treated them as undisposed of under any prior grant, and as being then subject to disposal as public lands whether certified under the original grant or not.

The 7th section provides "that all the conditions and limi- "tations contained in the act to which this act is an amend- "ment, and not expressly changed by this act, shall attach to "and run with the grants made by this act, except as the said "conditions and limitations have been modified, and may here- "after be modified by the General Assembly of the State of Iowa."

This provision clearly shows that so far as they remain unchanged all the provisions of the original grant attach to and run with the grant of June 2, 1864, within the amended limits. In other words, the conditions and limitations of the original grant which remain unmodified, attach to and run with the modifications made by the act of June 2, 1864, and of course within the same limits. The plain meaning of this is that the unmodified and modified conditions run together within the same limits as one grant; that outside of the amended limits there is no grant; and that so far as the grant of 1864 operates

the original grant has ceased to operate except as amended.

It has already been stated that when the Mississippi and Missouri Railroad Company had completed 130 miles of the road to Kellogg seven divisions of the granted lands of twenty miles each had become subject to sale under the conditions of the Congressional grant, and under the operation of the State grant had assumed the *status* of *sold* lands; that nine divisions of the granted lands still retained the *status* of unsold lands not having become subject to sale under the Congressional grant. These nine divisions could only become subject to sale from time to time under the original grant, by the construction of the additional sections of the road west of Kellogg. Had the original grant remained unamended, the lands in these nine divisions as they became subject to sale by the construction of the road west of Kellogg, would have assumed the *status* of *sold* lands under the operation of the State grant, even though the road had been constructed over a modified route, located by proper authority.

But west of Kellogg the grant of 1856 as amended by the act of June 2, 1864, embraced even, as well as odd numbered sections, and its indemnity limits were enlarged to twenty miles. Besides, the amendatory act contemplated new indemnity selections to be made, based upon the larger quantity of land within the granted limits, incident to bringing the even sections within the provisions of the grant. The State grant made in July, 1856, could operate only upon lands embraced in the original grant made by Congress. It could not operate upon the grant as amended. The lands embraced in the nine divisions west of Kellogg, still unsold in 1866, could not assume the *status* of *sold* lands under the operation of the State grant, under the changed condition of things brought about by the amendatory act. Hence, it was necessary for Congress, in the act of June 2, 1864, either to confer new authority upon the State of Iowa, to sell the lands west of Kellogg from time to time, as the construction of the road progressed, or adopt some other method of transferring to the beneficiary of the grant the title to the granted lands. The State by its grant

of July, 1856, had divested itself of all interest in the lands granted by Congress so far as it had the power to do so. It held from the first but a naked legal title, in trust for the purposes specified in the statute, without any beneficial interest in the lands. The question was, therefore, one simply between the United States and the beneficiaries of the grant, and instead of conferring new power upon the State to sell the granted lands west of Kellogg, Congress directed the Secretary of the Interior to cause them to be certified and conveyed to the beneficiaries from time to time as the additional sections of the road might be constructed. These conveyances were intended to include all the lands embraced in the nine divisions that had not become subject to sale in 1866 when the Chicago, Rock Island and Pacific Railroad Company became interested in the road; including the lands previously certified by the Department of the Interior under the original grant so far as they fell within the new twenty-mile limits. So far as lands previously certified under the original grant fall outside of the amended limits, they have become disencumbered of all claim to them under the grant of 1856 from the effect of the amendatory act, which is to give the original grant an entirely different form so far as the amendment operates. The latter operates from Kellogg westward, and hence west of Kellogg the grant of 1856 ceased to operate in its original form from the time the amendment took effect, and thenceforth operated only as amended and within the amended limits. So far as the act of June 2, 1864, has effect the grants of 1856 and 1864 operate together as one grant and within the same limits. The grant of 1864 is simply the grant of 1856 amended, and any lands not embraced in the amendment are disencumbered of all claim under the grant in its original form, notwithstanding they may have been certified under the grant prior to its amendment.

The court below virtually holds that west of Kellogg the original and amended grants operate side by side as two distinct and separate grants and along two separate and independent lines. According to that theory the act of June 2,

1864, made an additional instead of an amendatory grant, and instead of authorizing the location of the old line to be modified and changed, it authorized the location of an additional line. But the construction is faulty because it is based upon hypotheses that receive no countenance in the language of either the amendatory or the original act.

The claim of plaintiffs in error is not in the nature of an assault upon any rights acquired by the defendants in error under the grant of 1856. The Mississippi and Missouri Railroad Company could not acquire title to lands under that grant, except as they became subject to sale from time to time by the construction of the road. It has already been shown that nine divisions of the granted lands still remained unsold in 1866 when the interests of that company were sold by a judicial sale, for the reason that the lands in such nine divisions had not become subject to sale under the conditions of the Congressional grant. Hence, that company had acquired no title to the lands in such nine divisions, other than a mere preference right to acquire title to them by constructing the additional sections of the road. The act of June 2, 1864, saved all vested rights, but as no rights had vested to the lands embraced in such nine divisions there were none to be saved in respect to such lands. When the road had been constructed to Kellogg seven divisions of the granted lands had become subject to sale from time to time, and the title to these lands had become vested in the Mississippi and Missouri Railroad Company under the operation of the State grant. The lands in these seven divisions had nearly all become located by the completion of 130 miles of the road, one half division only remaining unlocated in 1866.

The Mississeppi & Missouri Railroad Company had, therefore, acquired title to all the granted lands lying on either side of the constructed road between Davenport and Kellogg whether the quantity was great or small. It also possessed the right to acquire title to the residue of the lands on either side of the old line by constructing the road over the same. All these rights were protected by the act of June 2, 1864.

All of them were embraced in the judicial sale made in 1866, and passed to the Chicago, Rock Island and Pacific Railroad Company by its purchase then made.

The supplemental act of the general assembly of Iowa, approved January 28, 1857, expressly required the mortgages or deeds of trust therein authorized, to be made subject to all the conditions of the Congressional and State grants; the mortgages were expressly made subject to such conditions; the decree of the U. S. Circuit Court ordering the sale of the mortgaged premises, directed the sale only of such interest, claim or demand as the Mississippi and Missouri Railroad Company had at the date of the mortgages, or had subsequently acquired; and the act of the General Assembly of Iowa, approved February 11, 1868, merely granted to the Chicago, Rock Island and Pacific Railroad Company such right or interest as the State then had in the lands embraced in the Congressional grant.

There is no question about the invasion of vested rights involved in the controversy. It is not a question of grant or no grant. No one denies that the Chicago, Rock Island and Pacific Railroad Company acquired rights both under the original and amendatory grants. The question involved pertains to the *location* of the original grant west of Kellogg.

The court below held that the lands in contest outside of the amended limits are included in the original grant, and hence that the location of that grant is not confined to the amended limits, but exists within the original limits, regardless of the change made in the location of the original line; whereas the plaintiffs in error contend that by the amendment of the grant and the change in the location of the original line, the old line and the old limits became vacated; the original grant took the form of an amended grant and operates only within the amended limits. The plaintiffs in error therefore do not contend that any rights that had become vested under the original grant, have become divested by the amendatory act. The question involved pertains to the location of the original grant west of the point where the amendatory act took effect.

4. The plaintiffs in error submit that no right or title was acquired by the State of Iowa, or its grantee, by the certified and approved list of lands issued by the Department of the Interior under the original grant, in December, 1858. There is an act of Congress, approved August 3, 1854, (10 U. S. Stats., 346,) which makes lists of land certified by the Department of the Interior, equivalent to patents, but it is expressly limited to lists certified under grants made to States or Territories by acts of Congress which do not convey the fee simple title to the lands nor require patents to be issued therefor. But the list now under consideration was not issued under such an act of Congress. On the contrary the act of May 15, 1856, very clearly conveyed the title to the granted lands *in presenti*, and left nothing to be conveyed by the certified lists subsequently issued by the Department.

The question of the effect of such lists upon the title of the lands came before the Department of the Interior in 1857, when some of the railroad companies applied to have them issued as soon as maps of the routes had been filed and indemnity selections made.

The Department at first declined to issue the lists as the lands had not been earned by the applicants. But the latter contended that the objection was an immaterial one, as the lists could not transfer any title at all events, because under railroad grants the title to the granted lands was conveyed by the statute, and that if title to a particular tract was not conveyed by the statute, no power existed in the executive officers to convey the title under the grant by any method that might be adopted. The question was finally referred to Attorney General Black, who, on the 7th of June, 1857, rendered an opinion sustaining the views of the parties applying for the lists, holding that the lists issued under railroad grants did not come within the act of August 3, 1854, because the statutes granting lands for railroad purposes did themselves convey the title to the granted lands. He further held that the lists issued under railroad grants were simply in the nature of information from the records of the Department; that there could be no

objection to issuing them to any person who desired to make a proper use of them, just as any other information would be furnished from the records, as the lists could have no influence upon the title of the States. (9 Opp. Att'y Gen., 41.)

After that opinion was rendered the Department issued the lists under railroad grants as mere information from the records as to what lands would enure to the respective grants if all the requirements of the granting acts should be complied with. The act of issuing them was never considered in the nature of an adjudication, and if by inadvertence, or from incompleteness of the records at the date of issue, a circumstance which frequently occurred, tracts were included in the lists which ought to have been excluded, or were excluded when they should have been included, the corrections were subsequently made by simply disposing of the tracts improperly included, regardless of the lists, and issuing supplemental lists of the tracts improperly excluded from the first. This was the practice in vogue in the Department in December, 1858, when the list embracing the odd-section lands in controversy was issued. It was issued under the rule announced by Attorney General Black in the opinion above cited, and the plaintiffs in error submit that the law is correctly defined in that opinion, and that the list referred to did not have and could not have any effect upon the title of the lands included in it.

5. The plaintiffs in error further submit that the court below erred in ruling that the acts of surveying and locating a line and filing a map of the same in the proper office, necessarily had the effect of designating the granted lands under the act of May 15, 1856, and that by such acts the grant attached to the lands thus designated. The plaintiffs in error deny that the performance of such acts had any effect whatever upon the title to the granted lands, and contend that the title to the identical tracts embraced in the Congressional grant of 1856 vested in the State of Iowa from the date of the granting act, and that the only lands embraced in the grant were such odd-numbered tracts as were subsequently found to be within six and fifteen miles of the completed *road*.

The act of May 15, 1856, grants lands no where else than within six miles of the *road* aided by the grant; it grants them within the same limits the double minimum even sections are located in, with a right to select indemnity lands within fifteen miles of the line of the *road*. Now, when a statute in plain terms locates lands within six miles of a *road*, how can it be said that lands within six miles of a mere line which may never be the line of a *road*, are granted lands under such a statute? If the line is in fact a *definitely fixed* one; that is, if it is the line upon which the road is subsequently constructed, it will of course identify the granted lands, because such a line is coincident with the road, but if it does identify them it simply identifies lands to which the title had already vested in the State, prior to the location of the line and without regard to it. The location of the line has no effect whatever upon the title to the granted lands under a grant like that of May 15, 1856. It may have the effect of identifying the lands, or it may not, depending upon the circumstance of the road being subsequently constructed upon it. It is the *road* which certainly identifies the granted lands, because nothing but the road itself can certainly point out the lands which will be located within six miles of it when completed. The completion of the road in twenty-mile sections, will point out and designate the lands upon which the grant had taken effect from the date of the statute, no matter how many lines had been previously located. The policy of the grant of 1856 was that of *no road no lands*. Although the grant took effect from its date, the specific tracts embraced in the grant could only be ascertained by constructing the road, because the statute expressly locates the granted lands within six miles of the *road* and grants lands at no other point. The grant took effect according to the maxim of *certum est quod certum reddi potest*, because, although at the date of the grant, it was not mathematically certain where the road would be located between the termini and other points mentioned in the statute, such certainty was not necessary to meet the requirements of the statute. By locating the grant upon unappropriated odd-numbered tracts within six

miles of a road to be subsequently constructed from the city of Davenport through Iowa City and Fort Des Moines to Council Bluffs, the grant was capable of being reduced to a certainty within the scope of the maxim above quoted, and within the intent and purposes of the statute. The grant operated, not in the nature of a float, which takes effect only from the date of location, but as a grant *in presenti*, taking effect immediately from the date of the statute, upon the specific tracts subsequently found to be within six miles of the com pleted road. (Missouri, Kansas and Texas Railroad Company *vs.* The Kansas Pacific Railroad Company, 7 Otto, 491.)

There is nothing in the statute indicating in any way that the location of even a definitely fixed line has any effect whatever upon the title to the granted lands; but, on the contrary, its language clearly shows that the grant would attach to specific tracts prior to the location of the line, because it authorizes the selection of indemnity lands in lieu of *granted* tracts disposed of by the United States between the date of the grant and the location of the line; thus showing that the grant had attached to specific tracts before the line was fixed, and that the location of the line had nothing to do with the taking effect of the grant. And it is only a line that is definitely fixed in the sense of being the line upon which the road is subsequntly constructed that will identify the granted lands, and authorize the selection of indemnity. Selections made upon any other line than the one upon which the road is afterwards completed, are not made within the statute, for no other line comes within its purview or has any *status* under its provisions.

The title of the State took effect prior to the location of the line, and the title of the State's grantee could only take effect by the construction of the road. Many of the railroad grants made by Congress, substantially similar to one under consideration, require the Secretary of the Interior to withdraw from market the lands embraced in the respective grants on maps of the routes being filed in his Department. Now if the mere location of a line had the effect of segregating the granted lands from those not granted there would be no lands

to withdraw from market in such cases and the direction to the Secretary would be more surplusage.

Even when the statute does not expressly authorize it, a withdrawal is always made after the route of a road is located, and if not made the lands would remain in market until the construction of the road commenced and would then become identified as granted lands as the construction of the road progressed. The court below therefore erred in giving to the acts of locating the old line, and selecting indemnity within fifteen miles of the same, the effect of vesting in the Mississippi and Missouri Railroad Company a title to the lands in controversy.

The plaintiffs in error therefore submit in conclusion that the record shows no title in the defendants in error for any of the lands in controversy.

1. Because the evidence shows that the lands outside of the amended limits are more than twenty miles from the constructed road, and the grant of 1856 in its original form embraced no lands at such a distance from the road.

2. Because there is no evidence in the record showing that the odd-numbered tracts in controversy within the amended limits are within fifteen miles of the constructed road and the original grant did not embrace lands more than fifteen miles from the constructed road.

3. Because the grant of 1856 in its original form did not embrace even section lands, and hence could not embrace the 120 acres of even section lands in controversy outside of the amended limits.

4. Because the record shows no evidence of title acquired under the act of June 2, 1864, by certification and conveyance which the Secretary of the Interior is directed to cause to be made. Hence, the record shows no evidence of title to the even or odd section lands in controversy within the amended limits.

5. Because there is no evidence that the tracts in controversy within the amended limits were ever selected as indemnity under the act of June 2, 1864, or that any right was acquired to them in any way under the provisions of that act.

6. Because there is no evidence to show that in contemplation of law there are any fifteen-mile limits west of Kellogg, or any limits of any kind, or definitely fixed line, outside of the amended twenty-mile limits; the evidence showing the contrary to be the fact

7. Because the evidence shows that Congress expressly protected the rights of the plaintiffs in error by excepting the lands in controversy from the operation of an act confirming title to lands in the defendants in error, and there is nothing in the record that shows the action of the legislature to have been erroneous.

S. S. HENKLE *and*
JOHN S. HAUKE,
Counsel for Plaintiffs in Error.

JAN 19 1880
JAMES H. McKENNEY, CLERK

[redacted]

October Term, A. D., 1880.

:o:

No. 932.

:o:

GEORGE W. GRINNELL AND 28 OTHERS,
Severally Plaintiffs in Error,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Defendant in Error.

:o:

REPLY

TO ARGUMENT FILED BY THOS. F. WITHROW, ESQ., FOR DEFENDANT IN ERROR.

:o:

Error to the Supreme Court of the State of Iowa.

:o:

S. S. HENKLE *and*
JOHN S. HAUKE,
For Plaintiffs in Error.

Supreme Court of the United States.

October Term, A. D., 1880.

GEORGE W. GRINNELL, H. P. EMERY, JOHN ROBINSON, JOSEPH THARNISH, MARY L. BRUCE, A. HAMMOND, S. E. OGBORN, E. E. OGBORN, GEORGE ULRICH, JOHN SLATER, JACOB WEAKLINE, LYDIA DUNHAM, ANDREW WILFONG, ED. PENNISTON, GEORGE DARLING, A. L. BELL, CHAS. BROWN, EBENEZER TREFREY, VIOLETTA ROPER, H. B. LATHROP, W. D. PACKARD, JOHN BRUCE, S. B. DUNCAN AND WILLIAM BRUCE,

Severally Plaintiffs in Error,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Defendant in Error.

} No. 688.

Error to the Supreme Court of Iowa.

REPLY

BY THE PLAINTIFFS IN ERROR.

THE EVIDENCE DISCLOSED BY THE RECORD.

1. To the allegations of the learned counsel for the defendant in error that the record does not present all the evidence necessary to a re-examination of the verdict, and that it is apparent upon the face of the opinion of the Supreme Court

of Iowa that it did not examine the sufficiency of the evidence to establish the facts upon which the judgment in each case rests, the plaintiffs in error reply that the record contains such an abstract of the evidence as was agreed by the counsel for the respective parties to be sufficient for a full understanding of all questions presented to the court for decision. See Stipulations, Record, pp. 31, 32 and 33. They reply further that it is manifest from the appellants' second amendment of the original abstract, category III, commencing on page 41 of the record and ending top of page 42, that the list of even section lands certified under the act of June 2, 1864, in 1870 was not introduced as evidence by the plaintiff below; the very fact of the list not being presented for the consideration of the court being made a ground of exception by the defendants below, plaintiffs in error here.

They furthermore reply that it abundantly appears from the opinion rendered by the Supreme Court of Iowa as found on pages 42 to 47 of the record, that said court fully considered all the evidence which it deemed necessary to establish the facts upon which its judgment rested. The court carefully summarizes what it calls the controlling facts in the case, necessary to be considered in reaching its conclusion. It expressly states that the errors assigned to the rulings of the court below upon the admission of testimony, relate to the very right of plaintiff to recover and assail its title to the land. (See second division of the Opinion.) At the close of the opinion the court states that twenty-three other cases were submitted upon the same abstract with the Grinnell case; that the identical questions presented in the last-named case arise in those; and that a judgment of affirmance must be entered in each case. The court admits in the seventh division of the opinion that it had not considered all the facts disclosed by the record, because it was satisfied with the conclusions it had reached and deemed any further consideration of facts unnecessary.

If, therefore, the court declined to take notice of the fact, or to give it any consideration whatever, that part of the

lands in controversy were even section lands and not embraced in the grant of 1856, it was not the fault of the plaintiffs in error, nor was it from any defect in the record, as the fact is fully disclosed therein, and the proper exception filed.

This is not a case where the record fails to "disclose all the evidence or is confused or incomplete."

On the contrary the record is precisely such a one as the respective parties by stipulation agreed should be treated as a complete record; and it is manifest that it presents all the facts necessary to a full understanding of all the issues involved.

UPON A MOTION FOR A NEW TRIAL.

2. It is conceded that this court will not revise the rulings of an inferior State court made upon a motion before it for a new trial, and that the judgment of the lower court will not be examined through its rulings upon such a motion. But that principle has no application here. The appeal to the Supreme Court of Iowa was not based upon the ruling made by the lower court upon a motion for a new trial. The judgment appealed from was in each case a judgment rendered upon the verdict returned by the jury after it had been instructed by the court to bring in a verdict for the plaintiff below.—See Record p. 22.

LOCUS OF THE LANDS.

3. Counsel for defendant in error on page 4 of his argument correctly states that the lands claimed by Grinnel, Mary Bruce, Hammond, S. E. Ogborn, E. E. Ogborn, Ulrich, Packard, Slater, Weakline, Dunham, Wilfong, Penniston, Darling, Bell, and Lathrop, are odd section lands within the 15 mile limit on the north side of the old line located in 1856 and 1857.

All these lands are outside of and beyond the new 20 mile limit of the amendatory grant of June 2, 1864. So are the lands claimed by Robinson, Duncan, John Bruce, William Bruce and Charles Brown. These twenty claims are all beyond the new 20 mile limit and all of them are odd section

lands except a part of the land claimed by Charles Brown, which belongs to an even section but is situated outside of and beyond the new twenty mile limit.

The learned counsel fell into an error on page 4 of his argument about the claims of Robinson, Trefrey and Roper (Nos. 8, 10 and 20, pages 23, 24, 37 and 38 of the Record) being in even numbered sections certified under the grant of June 2, 1864. They are odd section lands and were certified in December, 1858, under the grant of 1856.

The lands claimed by Trefrey and Roper (Nos. 19 and 20, pp. 37 and 38 of the Record) are in an odd numbered section within the new 20 mile limit, and within the old 15 mile limit located under the grant of 1856. They are on the outer edge of and just within the 20 mile limit. So are the lands claimed by Emery and Tharnish, which belong to an even section, to wit, section 28, township 80 of range 35, and the 20 mile limit passes through this section. These lands are within the *old* six mile limits located under the grant of 1856. (Nos. 2 and 4, pp. 23 and 24 of the Record.)

Counsel may be correct in his statement that part of the land claimed by Charles Brown, to-wit, the part belonging to an even section, was certified under the act of June 2, 1864, although it is located beyond the 20 mile limit of the amendatory grant. It is a fact that supplemental list No. 71, issued to defendant in error on the 20th June of 1870, and purporting to be a list of lands certified under the act of June 2, 1864, embraces 6,912 acres of even section lands within the old limits located under the grant of 1856, but outside of and beyond the new 20 mile limit, and the land claimed by Brown may be on that list.

Counsel for plaintiffs in error have not disputed the fact that each tract in controversy is within either the old or the new limits. What they asserted was that the grant of 1856, as originally made, did not embrace even section lands, and that no evidence was presented in the trial court by the plaintiff below, of any of the lands within the 20 mile limits having been certified and conveyed under the act of June 2,

1864. The language which counsel on page 5 of his argument quotes from top of page 42 of the Record, that "said land was certified to plaintiff on the list dated in 1870," shows that the list was not introduced as evidence, and that the exception taken to the ruling of the court was based upon the extraordinary circumstance that the court rendered judgment in favor of the plaintiff below for land belonging to an even section upon testimony submitted to prove title derived through the original grant of 1856, which did not embrace even section lands.

There is no obscurity or incompleteness about the record on that point, and the Supreme Court of Iowa made no complaint of any such defect. The record conclusively shows that judgment was rendered for the plaintiff below for both odd section and even section lands upon testimony submitted to prove the acquisition of title under the Congressional and State grants of 1856, and without any testimony being submitted to prove the certification and conveyance of any of the lands in controversy under the amendatory act of June 2, 1864. If the record were in fact defective and failed to present an abstract of all the testimony before the court, the learned counsel who so ably represents the defendant in error would have no difficulty in effecting the necessary correction. The difficulty that confronts him lies in the fact that the record is *not* defective.

The list of even section lands certified in 1870 was not introduced in evidence. If it had been introduced it would have been objected to by the defendants below for the following reasons, to-wit:

First. For the reason that in preparing said list and certifying the lands therein, the distinction of *granted* and *indemnity* limits was entirely ignored, and all the even section lands not otherwise appropriated within the old or the new limits, and without any selection as lands in place, or as tracts in lieu of lands in place, otherwise disposed of, were certified to the defendant in error as within the twenty mile limit of the act of June 2, 1864.

Second. For the reason that no distinction was made between lands within or without the twenty mile limits, as the list contains nearly seven thousand acres of even section lands within the old six and fifteen mile limits, but entirely outside of and beyond the new twenty mile limits.

Third. For the reason that a mere certified list of lands makes no conveyance of title under the act of June 2, 1864, the conveyance of title contemplated by the act being manifestly by means of an instrument in the nature of a railroad patent.

The officers of the land department construed the act of June 2, 1864, as making an *additional* grant, and the modified route as an *additional* line, and perceiving that all the additional lands available, added to those certified under the original grant, would fall short of making the full complement of six sections of land per mile, ignored the divisions made by the statute into granted and indemnity limits, and certified the lands without regard to any such distinction; theoretically recognizing but one limit and practically ignoring even that.

It may be that the difficulties to be encountered by the introduction of such a document is evidence of title deterred the plaintiff below from its introduction, but whether that was the cause or not, the fact nevertheless remains that the list of 1870 was not introduced as evidence, nor any other document purporting to make conveyance of title under the act of June 2, 1864.

A GRANT IN PRESENTI.

4. The learned counsel falls into another error where he states on page 7 of his argument that it is claimed in the argument of the plaintiffs in error that the grant of 1856 was in the nature of a *float* and did not attach to any specific lands until the line of the road was definitely fixed. Counsel for plaintiffs in error made no such statement and hold to no such theory. On the contrary in their 5th proposition on page 27 of their opening argument they distinctly state that title to the identical tracts embraced in the grant of 1856 vested in the

State of Iowa from the date of the granting act; and on page 29 near the top of the page they further state that the grant operated, not in the nature of a float, which takes effect only from the date of *location*, but as a grant in *præsenti*, taking effect immediately from the date of the statute upon the specific tracts subsequently found to be within six miles of the completed *road*.

The learned counsel is again mistaken where on page 8 of his argument he states that the question as to when the title vested *in the State* is studiously ignored by counsel for plaintiffs in error. That point is not only clearly stated but is repeated in a variety of forms from page 27 to page 30 of the opening argument.

The title to the identical tracts embraced in the grant vested in the State of Iowa in trust for the purposes contemplated by the statute, from the date of the granting act. When the title vested in the State the lands were unlocated, and so they were at the time the State regranted them to the Mississippi and Missouri Railroad Company.

The State accepted the Congressional grant upon the terms, conditions and restrictions contained therein, and it could regrant them only according to such conditions and restrictions. What these conditions and restrictions are is fully explained in the opening argument, 2d proposition, commencing at the foot of page 12 and ending on page 18.

ACTION OF EXECUTIVE OFFICERS.

6. Counsel for the defendant in error manifestly misapprehends the meaning of Attorney General Cushing in the opinion rendered February 16, 1857. That officer did not mean that the State by filing plats of the line in the General Land Office changed its *inchoate* into a *perfect* title, and that the State would not lose its right to appropriate the dependent lands by changing the location of the line after the filing of the plats. The statute makes no provision about filing a plat of the route and a statutory right cannot depend upon matters not prescribed in the statute. It was not possible for the State of Iowa to

acquire a *perfect* title to the lands granted by the act of May 15, 1856, except by *constructing the road* contemplated by the act. Independently of the construction of the road the title of the State was a *defeasible* title; the State holding simply on naked trust, for a specified purpose, without any beneficial interest in the land; liable to set aside by Congress on account of failure to discharge the trust in the manner prescribed. Such a title is not a *perfect* one and the Attorney General did not mean to characterize it as such. He expressly stated that by filing a plat of the route in the land office the State perfected its *inchoate* title, as a pre-emptor does by a corresponding act. The *corresponding* act of the pre-emptor to which the Attorney General referred, is the act of filing a *declaratory statement*, and everybody knows that a pre-emptor does not change his *inchoate* into a *perfect* title by making such a filing. And everybody knows too, that a pre-emptor loses his inchoate title by a change of settlement as well after he has filed his declaratory statement as before it.

The Attorney General meant that the State by locating a line for the construction of the road, acquired a preference right to appropriate the dependent lands by rendering the consideration upon which the title was made dependent, to wit, by constructing the road; in the same manner that a pre-emptor by actual settlement and filing a declaratory statement acquires a preference right to appropriate the land settled upon by complying with the conditions prescribed in the pre-emption act.

The title of the State took effect from the date of the statute upon lands to be subsequently identified and located, according to the maxim of *certum est quod certum reddi potest.* A *definitely fixed line*—that is, a line upon which the road would be subsequently constructed, would *identify* the granted lands, precisely as an application to locate lands under the public land system would identify the lands applied for. But although *identified* by the application the lands applied for would not be located by it in the technical sense of the word *located.* They would only become located by the deposit of the money or scrip with the

proper officer; that is, by rendering the consideration upon which the title was made dependent.

The locator would then become entitled to a patent, where the law provides for a patent; or would become invested with the title to the land where the statute transfers the title independently of a patent.

The first applicant to locate land acquires a preference right to become its locator if the land is subject to his application, and he perfects his location by rendering the consideration which the United States has agreed to accept for the land. Now in the act of May 15, 1856, the United States granted lands for the construction of a railroad. No matter whether the grant is called a donation or not, the consideration for the lands was a constructed *road*. Congress granted the lands on each side of the *road* contemplated by the statute, within a specified distance of the same; and it granted lands nowhere else. It did not grant lands on each side of a mere line, although a *definitely fixed* one; nor did the lands become located by a line in the technical sense of the word *located*. A definitely fixed line *identified* the granted lands and conferred upon the State or its grantee the inchoate right of acquiring a perfect title to the lands by constructing the road upon the line. The construction of the road being the consideration upon which the title depends, the lands became technically located as the road was constructed, and a perfect and complete title to the lands on each side of the road vested in the State's grantee as the road was constructed. The construction of every twenty mile section of the road was the consideration rendered for the dependent lands on each side thereof. The defeasible and imperfect title of the State took effect from the date of the statute, upon the lands subsequently found to be on each side of the constructed road, but the title became perfect only by the construction of the road, that being the consideration upon which the lands were granted; the policy of the statute being, *no road no lands*, as stated in the opening argument on page 28.

The learned counsel for the defendant in error falls into

another serious mistake on page 8 of his argument where he states that it was indispensable that the Secretary of the Interior should determine when and where the line was *definitely located*. Neither the Secretary of the Interior, nor the Attorney General, nor any other executive officer, ever undertook to determine that any line except the one upon which the road would be subsequently constructed, could be a *definitely fixed* line within the meaning of the act of May 15, 1856. The Attorney General expressly stated that "*definitely fixed* implies fixed without capacity of change," as stated in the opening argument on page 12.

The Secretary of the Interior with the assistance of the Attorney General determined what acts upon the part of a railroad company were necessary to define and identify the lines designated in the act of May 15, 1856, as *definitely fixed* ones, so that the executive officers could act upon them as such. Except so far as the statute designated points through which a road should be constructed, the executive officers had no power to control the location, and they did not attempt to control it, nor to determine when or where a line for a road should be located. Nor did they ever undertake to construe the words *definitely fixed* as designating any other line than the one upon which the road would be constructed.

All that the executive officers ever undertook to determine touching the matter of a definitely fixed line presented to the Department *as such* by a railroad company, for the purpose of securing a withdrawal of lands or an approval of indemnity selections, was, that the Department could not act upon it or treat it as such until the company had designated and defined the line in the manner prescribed.

Such action made no determination of the question whether the line was or was not *definitely fixed*, any more than the preliminary action taken upon the application of a pre-emption or homestead settler determines the question as to whether he is or is not a qualified settler under the statute. The Department presumes, until the contrary appears, that the application of a settler is made in good faith, and issues to him the

necessary papers, but he can claim no benefit from such preliminary action if it subsequently appears that he has failed to comply with the statute. The executive officers have never undertaken to decide that a withdrawal of lands, or approval of selections, based upon a route platted and filed in the Department as a definitely fixed line, can enure to the benefit of a railroad company independently of the construction of the road upon the line.

It is true that in respect to the lands in controversy in this case the Department has decided the title to be in the defendant in error, but the decision was the result of the construction which the Department placed upon the act of June 2, 1864, construing it as an *additional* grant, and the modified route as an *additional* line. It was not the result of a Departmental construction that a line becomes definitely fixed within the meaning of the act of May 15, 1856, by surveying and platting it in the manner prescribed by the regulations.

Counsel is equally mistaken in his reference on page 12 of his argument to the decision of this court in Railroad Company *vs.* Fremont County, 9 Wallace 94. In that case this court decided that the rights incident to a definitely fixed line were acquired along the line of the Burlington and Missouri River Railroad on the 24th of March, 1857, because on that day the directors of the company had finally determined to construct the road upon that particular line; whereas the Department had for thirteen years previous to that decision treated that line as definitely fixed from October 1856, because the railroad company had surveyed and platted the line according to regulations and represented it as definitely fixed when it filed a map of the same in the General Land Office.

And the court did not decide that the line was definitely fixed in the sense of vesting title to the dependent lands independently of the construction of the road. It merely decided that, assuming the line to be the one upon which the road would be subsequently constructed the right of the United States to dispose of the lands on each side of the line, adversely to the grant, did not cease until the railroad com-

pany on the 24th of March 1857 had finally determined to build its road upon the line. The line then became *definitely fixed* in the sense of conferring upon the State of Iowa or its grantee the inchoate or preference right of acquiring a perfect title to the dependent lands by constructing the road upon the same.

All that is involved in the executive action of withdrawing and certifying lands in aid of a railroad, under a grant like that of May 15, 1856, is, that such acts have been performed in the matter of locating the line, as confer upon the State or its grantee the preference right to acquire a perfect title to them by the construction of the road.

Such executive action determines nothing upon the point as to what is a definitely fixed line within the meaning of the statute.

The executive officers always *assume* that the road will be constructed upon the line represented on the plat filed by a railroad company, and all executive action is based upon that assumption.

As stated in the opening argument on page 26, the lands in controversy were certified under the grant of May 15, 1856, in pursuance of the opinion rendered by Attorney General Black on the 7th of June, 1857, that such lists were simply in the nature of information from the records and had no effect at all upon the title of the States.

After that opinion was rendered the Department certified the lists of lands as mere information of what lands would enure to a grant by constructing the road upon the line represented on the plat filed in the Department and no question of construing or interpreting the statute was involved in the act.

THE ACT OF JUNE 2, 1864.

1. Quoting the language of section 2 of the act of June 2, 1864, "out of any public lands *now* belonging to the United States," counsel for defendant in error on page 16 of his argument asks whether the lands embraced in the grant of May

15, 1856, belonged to the United States on the 2d of June, 1864; and so far as the point raised by counsel is concerned it may be conceded that they did not. Counsel for plaintiffs in error have not claimed that they did; but they insist that an application for authority to change the location of the old line, west of Kellogg and a grant of the authority applied for, was a virtual declaration by the company, adopted and acted upon by Congress, that west of Kellogg the line had not been definitely located, and consequently that west of that point the lands granted by the act of May 15, 1856, had not been identified or located. Hence west of Kellogg the lands on the 2d of June, 1864, still retained the *status* of "public lands *now* belonging to the United States," within the intent and purpose of the amendatory act. Counsel by his reasoning admits that until the line was definitely fixed all the lands were properly treated as public lands belonging to the United States, but he loses sight of the fact that in view of the act of June 2, 1864 the line west of Kellogg was not definitely fixed at that date; and that the very purpose and object of the amendatory act was to enable the company to make a definite location.

Sections one and two of the amendatory act are wholly based upon the idea that west of the terminus of the completed part of its road, the Mississippi and Missouri Railroad Company had not yet secured a line upon which it intended to construct the remaining part of the road—that west of Kellogg its line was not a definitely fixed one—hence in view of the amendatory act the lands west of Kellogg were on the 2d of June, 1864, still in the condition of public lands belonging to the United States; and the lands embraced in the grant of 1856 west of Kellogg became identified by the definitely fixed line located under the amendatory act of June 2, 1864, upon which the road was constructed.

Counsel insists that the lands within the old limits were *reserved* in October, 1856, by the Commissioner of the General Land Office, and that the reservation still continued in June, 1864. The reply to that criticism is, that they were not

reserved as against the railroad company; nor against such disposal as that contemplated and provided for in the amendatory act. The reservation made in October, 1856, was for the *benefit* of the railroad company and only for its benefit. It was no reservation in any other sense. Hence, was not a reservation within the meaning of the amendatory act, which excepts from certification and conveyance such *reserved* lands as were reserved adversely to the grant made by Congress in aid of that road. Moreover, an admission that the old line was not a definitely fixed one was a virtual relinquishment of the reservation, as it was based upon the presumption that the road would be constructed upon that line, and was not intended to have any effect in the absence of such a result.

The act of June 2, 1864, did not make a grant *in lieu* of the grant of 1856. So far as the act related to the Mississippi and Missouri Railroad it made provision for locating the grant of 1356 west of Kellogg; for enlarging its indemnity limits, and making it operate upon even as well as odd section lands, as fully explained in the third proposition commencing on page 18 of the opening argument filed for plaintiff in error.

This view of the amendatory act is entirely consistent with the proviso in the 4th section quoted on pages 17 and 18 of the argument of counsel for defendant in error.

The act did not make it obligatory upon the defendant in error or its predecessor to make such a change in its line as to leave outside of the new limits any of the lands within the old limits. All that was voluntary and optional upon the part of the defendant in error. The defendant in error was under no compulsion to build its road over a modified route in 1868 and 1869. It might have constructed it upon the old line; or within five miles of the old line; in which case none of the lands within the old fifteen mile limits would have fallen outside of the new twenty mile limits. The Mississippi and Missouri Railroad Company did not intend to construct the road more than five miles from the old line. It did not intend to leave any of the lands within the old limits outside of the new limits. Hence, did not apply for a provision in the

amendatory act confirming its title to lands within the old limits, as the Cedar Rapids and Missouri River, and Dubuque and Sioux City Railroad Companies did. The defendant in error took the risk of uncovering its old limits without having any law by which it could hold the lands excluded from the new limits.

All that is said by the learned counsel on the other side about Congress attempting to resume the grant of 1856 and substitute another in its place; and of the Sate of Iowa surrendering 400,000 acres of land in exchange for 160,000 acres, is the result of misaprehension. Counsel for plaintiffs in error have repeatedly explained that the question at issue relates to where the grant of 1856 is located west of Kellogg.

They have repeatedly stated that an application for legal authority to change the location of the old line was a virtual surrender of such line as a *definitely fixed* one; and that the statute granting the authority applied for was necessarily based upon the theory that so far as the new statute operated no definite location had been made. The grant of 1856 extended of course from the Mississippi to the Missouri river, and is in full operation to-day throughout the whole length of the constructed road. Congress never made any attempt to resume the grant of 1856, or to substitute another grant in the place of it.

It authorized the Mississippi and Missouri Railroad Company to change the location of its line so as to secure a *definitely fixed* line elsewhere than in its original location; at the same time enlarging the indemnity limits from 15 to 20 miles, and extending the grant to the even as well as the odd section lands.

The State of Iowa did not surrender 400,000 acres of lands in exchange for 160,000 acres.

The defendant in error by constructing the road so far south of the original location, left outside of the amended 20 mile limits about 85,000 acres of odd section lands previously certified under the grant of 1856, and it received 160,000 acres of even section lands certified under the amendatory grant of June 2, 1864. Hence the defendant in error suffered

no loss even as the matter now stands, and it was under no compulsion of constructing the road at such a distance from the old line as to leave any of the lands within the original limits outside of the amended limits. That was a voluntary act on the part of the defendent in error, at a time when it was the sole owner of all the interests acquired under both the original and the amendatory grants. The act was done after the mortgages had been foreclosed, and the interests of the mortgagees and of the Mississippi and Missouri Railroad Company had been purchased by defendant in error. It was done after the State of Iowa had made its grant of February 11, 1868. The State had nothing to do with changing the route and suffered no loss by the transaction. It was optional with the defendant in error whether it would construct the road within five miles of the old line and thus retain within the amendatory 20 mile limits all the lands previously certified within the original limits, or construct it at a greater distance from the old line and leave some of the lands within the old limits outside of the new limits.

PROVISO OF SECTION 4.

8. Referring to the proviso in section 4 of the amendatory act that no land shall be conveyed to the Cedar Rapids and Missouri River Railroad Company lying within fifteen miles of the original line of the Mississippi and Missouri Railroad Company, counsel for defendant in error inquires what the purpose of the provision was if lands outside of the amended limits are disencumbered of the grant of 1856. The reply is that the purpose of the proviso was to protect the claim of the Mississippi and Missouri Railroad Company, as that company did not intend to change its line more than five miles south of its original location, nor suffer any of the lands within the original limits to fall outside of the amended limits. It intended to retain within the new 20 mile limits all the lands within the old limits, and therefore did not apply to have a provision inserted into the amendatory act confirming

its title to lands within the original limits, as other companies did.

The extension of the indemnity limits from 15 to 20 miles rendered it possible to construct the road as much as five miles from the old line without uncovering the old limits, and the intention of the Mississippi and Missouri Railroad Company was to construct the road within that distance from the old line. Such being its intention that company did not feel the necessity of a provision in the amendatory act confirming its title to lands within the original limits, and therefore applied for none, and the act contains no such provision in respect to lands within the old limits of the Mississippi and Missouri Railroad.

DEEDS OF THE SPECIAL MASTER.

9. In reply to what is said on pages 26 and 27 of the argument of the learned counsel about the deeds made by the special master in chancery who conducted the sale in 1866 under the decree of foreclosure, attention is called to the remarks made on page 25 of the opening argument about the State supplemental act; the mortgages executed in pursuence of its provisions, and the decree of foreclosure; and it is only necessary to add here that under a statute thus worded; under mortgages couched in such terms and under such a decree, the special master had power only to convey such interest as the Mississippi and Missouri Railroad Company possessed, and could not convey any greater interest, no matter what might be the form of his deeds. The only title that company possessed to the lands west of Kellogg when the mortgages were foreclosed in 1866 was the inchoate right of acquiring a complete title to them by constructing the road either over the old line or within five miles of the same, so as to retain all the lands within the new limits, and the Mississippi and Missouri Railroad Company never did anything to impair the right of its successor in interest thus to acquire title to said lands.

THE INITIAL COMPARED WITH OTHER SALES.

10. On page 28 of his argument counsel for defendant in error compares the language of section 4 in the act of May 15, 1856, relating to the initial sale with that relating to other sales in the same section as though counsel for plaintiffs in error had made some distinction touching the different sales, which they did not as will be seen by examing pages 15 to 18 of the opening argument.

When the State regranted to the Mississippi and Missouri Railroad Company, the lands embraced in the Congressional grant of May 15, 1856, they were unlocated, as not even a line for the road had then been surveyed. The State had the power to sell at that date the lands embraced in the initial sale, and the company acquired the title to the lands in the initial sale before their identification had become possible.

Nevertheless the title to the lands in the initial sale became vested in the State's grantee. The next step was to identify the lands. A line was then surveyed and platted and a map of the same filed in the General Land Office. The next step was to construct twenty miles of the road somewhere on the line; and when they were constructed somebody owned the odd numbered tracts coterminous to the constructed part and within six miles of the same. They came within the express language of the grant for they were within six miles of the *road* contemplated by the statute. Who owned the lands coterminous to the twenty miles of completed road? The United States did not own them for it had transferred the title to the identical lands mentioned, to the State of Iowa for a specified purpose. The State had regranted the lands to the Mississippi and Missouri Railroad Company so far as it had the power to grant them. At the date of its grant it had power to sell one twenty mile division of the granted lands included within a continuous length of twenty miles of the road. When the sale was made the twenty miles of road were not constructed, but when they were constructed there was one division of the granted lands that was included within a con-

tinuous length of twenty miles of the road, and had become located by the express language of the statute.

These lands did not belong to the United States for Congress had granted them to the State of Iowa. Neither did they belong to the State if the State had power to sell them, for it had regranted, or *sold* the lands so far as it had the power to do so. But no one can doubt that the State had the power to sell them for the statute expressly authorized it to sell one division of the granted lands in advance of the construction of any part of the road, and the State had made the sale. Under the grant made by the State the lands granted by Congress assumed the *status* of *sold* lands as rapidly as they became subject to sale under the conditions of the act of Congress.

But the lands coterminous to the twenty miles of completed road, were subject to sale by the express language of the act of Congress. Consequently they held the *status* of *sold* lands under the State grant, and therefore did not belong to the State. And as they belonged neither to the United States nor to the State of Iowa, they belonged of course to the Mississippi and Missouri Railroad Company as the grantee of the State. When twenty miles of the road were completed to another division of the granted lands became subject sale under the terms and conditions of the Congressional enactment, and being subject to sale assumed the *status* of *sold* lands under the grant made by the State, and in turn became located as the next twenty miles of road was constructed. It follows, therefore, that under a grant like that of May 15, 1856, the granted lands become located progressively under the terms and conditions of the statute, by the construction of the road.

When the Mississippi and Missouri Railroad Company had completed 130 miles of the road westward to Kellogg, nearly seven divisions of the granted lands had thus become located, lying coterminous to the completed part and within six miles of the same. These lands belonged neither to the United States nor to the State of Iowa for both had divested them-

selves of title to the same by their grants. The Mississippi and Missouri Railroad Company had acquired a perfect and indefeasible title to them by rendering the consideration upon which the perfect title depended, to wit, by the construction of the road. When the road was completed to Kellogg the granted lands coterminous to the completed part had become the private property of the company and were subject to taxation by the State as other private lands agreeably to the principle announced in Tucker *vs.* Ferguson, 22 Wall., 527.

But when the road was completed to Kellogg there were still nine divisions of the granted lands that had not become subject to sale under the act of Congress and which had not assumed the *status* of *sold* lands under the State grant, and to these nine divisions the Mississippi and Missouri Railroad Company had acquired no other title than simply the inchoate right of acquiring title to them by constructing the road agreeably to the terms of the statute.

In railroad grants providing for the government title to be conveyed by patents the Department is authorized to issue the patents as each ten or twenty miles of the road is completed, showing that in the opinion of Congress the company constructing the road becomes entitled to the coterminous lands as the construction of the road progresses. In the grant of May 15, 1856, the title to the lands is transferred by the statute without the issue of patents; the statute accomplishing directly by virtue of its own terms what under other statutes is effected only by an application for and an issue of patents.

The learned counsel on the other side cannot understand how the requirement that the lands shall be sold only as the work progresses can control the place where they shall be selected. The statute makes no provision for *selecting* the granted lands. It specifically locates them on each side of the *road*, and every mile of the *road* must necessarily identify some of the granted sections. The statute does not contemplate any *selection* of the lands in place. Provision is made for selecting the indemnity lands. The State doubtless could sell lands by description anywhere along a definitely fixed line

but they would only become certainly identified as *granted* lands by the construction of the road coterminous to them, because the statute grants lands nowhere else except on each side of the *road*.

IOWA ACT OF FEBRUARY 11, 1868.

Referring to the act of the General Assembly of Iowa approved February 11, 1868, counsel assumes that the lands in controversy were directly granted to defendant in error by that statute. But in the first place the State had already granted, so far as it has the power to grant, to the Mississippi and Missouri Railroad Company all the lands embraced in the Congressional grant of 1856, and had never resumed its grant to that company. In the second place, the State could grant the lands embraced in the Congressional grant, only according to the terms and conditions of the statute, and therefore only within six and fifteen miles of the road. The lands embraced in the grant could only become identified as granted lands by the constructed road. And in the third place, Congress, in the act of June 2, 1864, made specific provision for vesting in the railroad company, the title to the granted lands west of Kellogg by conveyances to be caused to be made by the Secretary of the Interior.

The State of Iowa made no attempt at any time to grant the lands in controversy except as they might be identified as lands embraced in the Congressional grant of 1856; and as defendant in error modified and changed the location of the old line and constructed the road upon the modified location, virtually nullifying the original location and limits, it is no longer possible to identify the lands in controversy as part of the lands embraced in the grant of 1856 because that grant in its original form was limited to lands within 6 and 15 miles of the *road*, and the lands in controversy are not thus located

The learned counsel is entirely mistaken about the Iowa act of February 11, 1868, waiving or assuming to waive any of the conditions found in the Congressional grant of 1856. No-

thing of the kind was attempted by the General Assembly of the State.

CERTIFIED LISTS.

Counsel for plaintiffs in error refer to page 26 of the opening argument for a reply to so much of the argument filed for defendant in error as claims for the certified list of lands issued in December 1858, the effect of a patent.

The act of August 3, 1854, has no application at all to such grants as that of May 15, 1856, as was stated by Attorney General Black in the opinion referred to in the opening argument.

ABOUT DEFECTS IN PRELIMINARY STEPS.

Counsel is mistaken about the plaintiffs in error relying upon defects in the preliminary steps by which it is alleged defendant in error acquired title. The plaintiffs in error rely upon the fact that defendant in error has *no title at all* to the lands in controversy. They insist that before it can interfere with the possessions of the plaintiffs in error, the defendant in error must show title in itself and that it has wholly failed to show such title. They concede that if defendant in error had acquired title to these lands, however irregularly, the plaintiffs in error could not take advantage of the irregularities in the present proceeding. They have no doubt of the wisdom and propriety of the principles announced in Hoofnagle *vs.* Anderson and Jackson *vs.* Clark referred to by the learned counsel on the other side on page 37 of his argument, but they insist that the rule announced in these cases has no relevancy to the present case. They contend, however, that the correlative of the principle decided in these cases does obtain in present case. While it is true that the plaintiffs in error would be in no condition to take advantage of any defects in the preliminary proceedings necessary to vest title in the defendant in error if such title had in fact been acquired, it is equally true that in the absence of title, the defendant in error in such a proceeding as this cannot take advantage of the want of title in the plaintiffs in error, or avail itself of any title that may be

in the United States or in the State of Iowa. The defendant in error must stand upon its own title or fail through want of title. As it claims a statutory right it must show that its claim comes within the terms of the statute: and if it cannot be brought within the terms of the statute relied upon according to the well established rules of law, the defendant in error must fail. It must accept the correlative of the rule it so vigorously asks to have enforced against the plaintiffs in error. The certified list issued in December 1858 upon which the defendant in error places such great reliance was not intended by the officer issuing it to have any force or effect whatever except upon the condition that the road would be constructed upon the line represented on the map filed in the General Land Office by the predecessor of the defendant in error. And the remark applies equally well to all the other proceedings under the grant of 1856 and the several acts of the General Assembly of Iowa, upon which the defendant in error relies. They were all predicated upon the condition that the road would be constructed over that line; and they were not intended to have any force or effect in the absence of such a result. Everything that was done was based upon the theory and upon the understanding that the road would be constructed upon the original line. No other result was contemplated when these transactions occurred. Every one of the transactions relied upon by the defendant in error had special reference to that result. They all depended upon that condition, and so far as they related to specific parcels of land they all failed when the condition failed.

STATUS OF THE PLAINTIFFS IN ERROR.

On pages 48 and 49 of his argument counsel for defendant in error contends that the proviso inserted into the Act to quiet title to certain lands in the State of Iowa, generally called the Confirmatory Act of January 31, 1873, (see copy in the record pp. 50 and 51) was put there for the purpose of protecting the inchoate rights of preemption and homestead settlers recognized by the original grants. If that had been

the purpose of the proviso it would have been much more appropriately met by the proviso in its original form as it appeared in the Bill when it was first presented in Congress and after it had been reported by the Senate Committee on Public Lands. The Bill in its original form and as reported by the Committee is hereto appended as Ex. "A." As originally introduced the Bill applied to all the railroad companies in the State; but as the Chicago Rock Island & Pacific Railroad Company was the only one applying for its passage the Committee amended it so as to make it applicable to the one road only. As originally introduced and as amended by the Committee the closing words were as follows, "and not so as to affect adversely any valid homestead or preemption or other valid claims thereto existing at the date of such approval." This language met the idea of the learned counsel on the other side precisely, and much more appropriately than the words afterwards substituted for those above quoted. When the Bill was on its passage in the Senate, one of the Iowa Senators moved an amendment by substituting for the words quoted those found in the Bill as it became a law, to wit: "and all lands settled upon in good faith and now occupied by homestead as preemption settlers shall be excluded from the operation of this Act." It will be observed that the word *valid* is entirely omitted in the final amendment, actual settlement and good faith being the qualifications required.

The record shows that the plaintiffs in error were occupying at the date of said Act the lands respectively claimed by them; and that they made valuable improvements on the lands, such as are only made by settlers in good faith, anxious to secure title to the lands they improve.

Counsel objects that they were not preemption and homestead settlers at the date of the Confirmatory Act because they had not then initiated claims under the preemption and homestead laws. But the objection is without force as it is no unusual thing in statutes to designate settlers according to the claims they intend to initiate. In sections 2266 and 2275 of the Revised Statutes settlers upon unsurveyed lands are desig-

neted as preemption claimants and their claims as preemption claims although no steps can be taken, other than the act of settlement, to initiate such claims until after the land is surveped. So also in section 2341 settlements made on lands previously excluded from survey and sale on account of being designated as mineral lands, are called "homesteads," and the settlers designated as the *owners* of the homesteads, and authorized to acquire title under the homestead laws.

In the Act of February 26, 1859, legalizing settlements made on school sections prior to survey, a settlement made *with a view to preemption*, is called a preemption claim, although it was illegal and unauthorized prior to the passage of that act.

In the present case there can be no doubt that the proviso in the Act of January 31, 1873, applies directly to the plaintiffs in error and other settlers on lands left outside of the amended limits, and that it was intended to protect their claims as they were the only settlers who resisted the passage of the Confirmatory Act while it was pending before Congress. There were no settlers to claim the benefit of the proviso in that act except those located on lands supposed to be outside of the new 20 mile limits after the change of the route by the defendant in error. All of the settlers intended to locate outside of the 20 mile limits but from ignorance of the exact place of the line a few of them selected their claims within, but on the extreme outer edge of said limits.

Applications for the lands left ouside of the amended limits were made under the preemption and homestead laws by numbers of settlers as early as the spring of 1871, on account of the prevalent belief that the lands had become disencumbered of all claim under the railroad grant by being excluded from the amended limits; and on the applications being rejected by the local officers the claimants appealed to the Commissioner of the General Land Office who on the 12th of September 1871 in the case of H. C. Diggs, J. K. Johnson, Robert Gunn, and others, affirmed the action of the local officers

fect any title to lands that the defendant in error may have. But if the lands in controversy, outside of the amended limits, are not appropriated by the grant of May 15, 1856, they come directly within the provisions of the act of June 15, 1878, and the claims of the plaintiffs in error are expressly legalized and confirmed. The plaintiffs in error contend that the lands in controversy constitute no part of the grant of 1856; that they are vacant and unappropriated, and that so far as they are outside of the amended limits they come directly within the act of 1878, as they are not embraced in the Confirmatory Act of January 31, 1878, being expressly excepted from its operation by the proviso thereto.

The plaintiffs in error claim the benefit of this act of June 15, 1878, and specially invite attention to its provisions. Although passed after the commencement of this controversy in the inferior courts of Iowa, it is nevertheless such a statute as this court will take notice of *ex officio*, and has a direct bearing upon the status of the plaintiffs in error before this court.

It provides for restoring to settlement all vacant and unappropriated lands formerly withdrawn for the Mississippi & Missouri railroad, situated more than 20 miles from the amended route. It sets aside the reservation made by the withdrawal of 1856, and extends to the settlers occupying the lands the preference right of entering them.

To give them the proper standing before this court and authorize them to invoke its interposition against the acts of the defendant in error in attempting to oust them from the lands in controversy the plaintiffs in error rely first upon their actual settlements made in good faith upon said lands with the view of appropriating them under the preemption and homestead laws of the United States; second, upon the recognition given to their claims by Congress in excepting them from confirmation in the Confirmatory Act of January 31, 1873; and third, upon the act of June 15, 1878, legalizing settlements made on such vacant and unappropriated lands outside the amended limits as were formerly withdrawn under the grant of May 15,

1856, and giving to the settlers thereon a preference right to enter them. As they claim these rights and privileges under the laws of the United States, and the attempt is made to nullify them through proceedings in the State Courts of Iowa based upon acts of Congress, this court has jurisdiction to examine into their claims and to set aside the judgment of the State Court of Iowa if the same is founded in error.

NOT AN ADDITIONAL GRANT.

Counsel for defendant in error states categorically that it is manifest that Congress intended by the act of June 2, 1364, to make an *additional* grant, but he does not attempt to explain what the object was of changing the *location* of the old line upon the theory that the old line should still continue to locate the original grant. The act of June 2, 1864, as explained in the opening argument, does not authorize the location of an additional line. It simply authorizes a change in the location of the line represented on the map filed in the General Land Office by the Mississippi and Missouri Railroad Company, and certainly everybody understands that to change the *location* of an existing line is to vacate and set aside the original location and everything dependent upon it. Such a result can be prevented only by special legislative provision, and no such provision is found in the act of June 2, 1864, in respect to the old line of the Mississippi and Missouri Railroad Company.

It sometimes happens that a warrant or scrip locator under the public land system obtains permission to change his location, and he makes the change by *floating* his warrant or scrip to another tract of land. But no such a thing has ever been heard of as that of a warrant or scrip locator, after changing his location, claiming the land originally located as well as the tract embraced in the modified location. That is an invention that belongs wholly to the defendant in error. Under the authority granted in the act of June 2, 1864, it *floated* the old line from its original to its modified location, thereby vacating the original location and the original limits dependent upon

it; and it now claims the lands identified not only by the modified location, but by the original location as well.

It is stated in the opening argument, 3d proposition, commencing on page 18, that the act of changing the location of the old line under the statute of June 2, 1864, was simply changing the location of the grant of 1856. That if no other change had been made in the grant the lands west of Kellogg along the modified route would have become subject to sale and assumed the *status* of *sold* lands from time to time, under the operation of the State grant of July, 1856, as the construction of the remaining part of the road progressed. But as the Congressional grant of 1856 was further amended by enlarging the indemnity limits and rendering subject to its operation the even as well as the odd section lands, the lands could not all become subject to sale from time to time under the operation of the State grant as the latter embraced only such lands as were subject to the grant of 1856, as originally made. Hence Congress was under the necessity of granting further authority to the State to make sale of the lands or make some other provision for transferring the title of the lands to the beneficiaries of the grant. Hence the provision authorizing the Secretary of the Interior to cause to be certified and *conveyed* to the Mississippi and Missouri Railroad Company, from time to time as the road progresses, an amount of land equal to that originally authorized to be granted. The act contemplates that the indemnity selections authorized by the act of May 15, 1856, would be made within the modified limits, and with reference to the fact that both the odd and even section lands were subject to the operation of the grant. The expression, *then such selections may be made*, signified such selections as are authorized by the original act.

CHARLES STEWART AND JOSEPH TOMLINSON.

In the opening argument the above parties were named as defendants in error as they had prosecuted the suits against four of the plaintiffs in error in the lower courts of Iowa.

These parties were purchasers from the Chicago, Rock Island and Pacific Railroad Company, and that company therefore assumes the defence of these claims, the names of Stewart and Tomlinson as defendants in error being wholly omitted in the argument of counsel on the other side while the claims themselves are defended.

The names of these parties as defendants in error are therefore omitted in this reply.

Notwithstanding the fact that judgments had been rendered in previous proceedings against John Bruce, S. B. Duncan and William Bruce, for the lands respectively claimed by them, the record nevertheless shows that these claims are made part of the present proceeding and are to be governed by the judgment rendered by this court, regardless of the earlier proceedings in the lower courts of Iowa. (See case No. 10, p. 28 of the Record—Amendment to Abstract, p. 32; cases Nos. 22, 23 and 24, pp. 39, 40 and 41 of the record, and stipulation, pp. 31 and 33.)

POINTS NOT MET.

The plaintiffs in error submit in conclusion, that the learned counsel for defendant in error, able and skillful as he has shown himself to be, has wholly failed to meet the following points involved in the controversy, to-wit:

1. He has failed to show how lands can be claimed more than 15 miles from a road under a statute that grants lands only within that distance of the *road* aided by the grant.

2. He has failed to show how the odd numbered sections can be claimed as *granted* lands, where the alternate even sections are not *double minimum* lands, under a grant that locates both classes within the same limits.

3. He has failed to show how the State of Iowa, on the 14th of July, 1856, before any part of the road was constructed, could sell *all* the lands granted by Congress in aid of the Mis-

sissippi and Missouri Railroad, under a statute that authorized the State to sell the lands only from time to time as the construction of the road progressed.

4. He has failed to show that the State made any attempt to sell the lands except according to the terms and conditions of the Congressional grant; or how, according to such terms and conditions, the grantee of the State could claim title to all the lands along a road 320 miles in length when 130 miles had been completed.

5. He has failed to show how the mortgagees of the Mississippi and Missouri Railroad Company could acquire any greater title than that possessed by the company executing the mortgages, or how the special master in chancery executing the deeds under the decree of foreclosure could convey any other or better title than that possessed by the mortgagor at the date of foreclosure, as set out in the decree.

6. He has failed to show how the original line can be treated as definitely fixed in its original location, after its location has been modified and changed under the act of June 2, 1864.

7. He has failed to show how the location of the old line can be treated as modified and changed for the purpose of getting the lands within the modified limits; and at the same time treated as *un*modified and *un*changed for the purpose of holding the lands within the original limits.

8. He has failed to show that any document purporting to be evidence of title to lands within the modified limits was submitted by plaintiff in the trial courts of Iowa.

9. He has failed to cite any authority or point out any legal principle sustaining the theory that an executive or ministerial officer can legally administer a statute otherwise than according to the legislative intent.

The learned counsel has shown a remarkable familiarity with the history of these railroad grants and all the rulings and decisions that have even a remote application to any of the points involved in this controversy; and he has shown great ability and skill in handling the points that he has ventured to discuss; but he has cautiously avoided making a direct assault upon any of the leading propositions upon which the plaintiffs in error have based their claims; and such a method of proceeding from so able a lawyer furnishes convincing proof that the law is with the plaintiffs in error.

S. S. HENKLE and
JOHN S. HAUKE,
Counsel for Plaintiffs in Error.

"EXHIBIT A."

42D CONGRESS, 2D SESSION.

S. 1015.

IN THE SENATE OF THE UNITED STATES.

APRIL 20, 1872.

Mr. WRIGHT asked and, by unanimous consent, obtained leave to bring in the following bill; which was read twice, referred to the Committee on Public Lands, and ordered to be printed.

MAY 14, 1872.

Reported by Mr. POMEROY with amendments, viz: Strike out the words in [brackets] and insert the words printed in *italics*.

A BILL

To quiet the title to certain lands in the State of Iowa.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the title to the lands in the State of Iowa heretofore approved and certified by the Department of the Interior for railroad purposes, *to aid in the construction of a railroad from the city of Davenport, via Iowa City, to Council Bluffs*, under the [several] grants made by Congress, according to the adjustments thereof made at the General Land Office, be, the same is hereby, confirmed to *the Mississippi and Missouri Railroad Company and the Chicago, Rock Island and Pacific Railroad Company, and their assigns, they being* the corporations to whom said lands were certified: *Provided*, That this act shall be construed as conveying only any reversionary or other interest which the United States may have in said lands, and not so as to affect adversely any valid homestead or pre-emption, or other valid claims thereto existing at the date of such approval.

FILED
DEC 20 1880

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1880.

No. 683.

GEORGE W. GRINNELL, H. P. EMERY, JOHN ROBINSON, JOSEPH THARNISH, MARY L. BRUCE, A. HAMMOND, S. E. OGBORN, GEORGE ULRICH, W. D. PACKARD, JACOB SLATER, JACOB WEAKLINE, LYDIA DUNHAM, ANDREW WILFONG, ED. PENNISTON, GEORGE DARLING, A. L. BELL, EBENEZER TREFFEY, VIOLETTA ROPER, H. B. LATHROP, JOHN BRUCE, S. B. DUNCAN, AND WILLIAM BRUCE,

Severally Plaintiffs in Error,

v.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Defendant in Error.

} Error to the Supreme Court of the State of Iowa.

ARGUMENT FOR THE DEFENDANT IN ERROR.

Thos. F. Withrow,

FOR DEFENDANT IN ERROR.

CHICAGO:

BEACH, BARNARD & CO., LEGAL PRINTERS, 101 RANDOLPH STREET

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v.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Defendant in Error.

} Error to the Supreme Court of the State of Iowa.

ARGUMENT FOR THE DEFENDANT IN ERROR.

The defendant in error brought twenty-four actions in the Circuit Courts of Audubon, Shelby and Crawford Counties, in the State of Iowa, one against each of the above named plaintiffs in error. The defendant in each case claimed the title and right of possession in and to specific parcels of land in its petition described. Issues were joined in each case by a general denial, and by the allegation of affirmative matters of defense of an equitable nature, which the defendant is permitted to interpose in any form of action under the practice in that State. Each case was tried to a jury, and in each a verdict was returned under express instructions from the court, for the plaintiff there, who is defendant in error here. In each the court instructed the jury:

(1). The evidence leaves only a question of law.

(2). The evidence shows plaintiff entitled in law to recover.

The plaintiffs in error severally moved the court to grant new trials, upon the following grounds:

(1). The verdict is contrary to the evidence, and not sustained thereby.

(2). The verdict is contrary to the law.

(3). The Court erred in instructing the jury to find a verdict for the plaintiff.

(4). The Court erred in instructing the jury orally.[1]

These motions were overruled, and judgment entered in each case on the verdict.

The plaintiffs in error severally appealed to the Supreme Court of the State of Iowa. It was the duty of each to file in the Supreme Court "ten printed copies of an abridgment or "abstract of the case, setting forth so much thereof *as is* "*necessary to a full understanding of all questions presented to* "*the court for decision.*" The rule also requires, that this abstract shal be accompanied by a certified and complete record, unless the parties agree, in writing, to submit the cause upon the printed abstract.[2]

The appellants prepared what is called in the record, a consolidated abstract of the first 13 cases, and it was agreed that they should be "submitted to the Supreme Court on this con- "solidated abstract, and the same may be docketed in said court "as one case."[3] Subsequently it was stipulated, that the remaining 11 cases should be submitted "upon the same record "as" the first 13, "except as modified" in the additional abstract therewith filed.[4]

The cases were so submitted, and on the 14th June, 1879,

[1] Rec., p. 22, fols. 41, 42.

[2] A copy of the rules referred to are printed in the Appendix hereto, No. I. They will also be found in full in 43 Iowa Rep., p. 693.

[3] Rec., p. 31, fol. 55.

[4] Rec., p. 33, fol. 65.

the Supreme Court delivered an opinion, affirming the judgments below.

This opinion is found in the record.[5]

The opinion of the Supreme Court does not review the verdict upon the evidence, and could not in the condition of the record. The abstract submitted was prepared by the appellants, who are plaintiffs in error here, under a rule which required them to incorporate therein all of the original record, "necessary to a full understanding of all the questions presented "to the court for decision." The only questions presented by the abstract filed, relate to the construction of certain acts of Congress, and of the Legislature of the State of Iowa. It is apparent on the face of the abstract, that it does not present all of the evidence necessary to a re-examination of the verdict. The Supreme Court of that State will not review the finding of the jury or of the court upon an issue of fact, when the record does not disclose all of the evidence, or is confused, or is incomplete.[6]

The sufficiency of the evidence to establish the facts upon which the judgment rests cannot be questioned otherwise than by reviewing the ruling of the State Court upon the motion for a new trial. That it was not examined by the Supreme Court of Iowa, is apparent upon the face of the opinion, and as it was not reviewed there it cannot be here.

This court has no jurisdiction to revise the rulings of an inferior State Court upon the granting or refusing of a new trial, and the judgment of the lower court will not be examined through its rulings upon a motion for a new trial.[7]

The verdict in each case virtually finds that the defendant in error is the owner of the lands claimed under one of the grants mentioned in the record. The record shows affirmatively that

[5] Rec., pp. 42-48, incl., fols. 80-101, incl.

[6] Butt v. Tuthill, 10 Iowa, 585; Lorton *v.* Agnew, Morris, p. 64; Humphreys *v.* Darrington, 3 G. Green, p. 588.

[7] Kerr *v.* Clampit, 95 U, S., p. 195.

the lands claimed by Grinnell[8], Mary Bruce[9], Hammond[10], S. E. Ogborn[11], E. E. Ogborn[12], Ulrich[13], Packard[14], Slater[15], Weakline[16], Dunham[17], Wilfong[18], Penniston[19], Darling[20], Bell[21], and Lathrop[22], are odd sections within the 15 miles limit on the north side of the line of the railroad of the defendant in error, as established in 1856 and 1857.

It also appears that those claimed by Emery[23], Robinson[24], Tharnish[25], Treffey[26], and Roper[27]: were in even numbered sections certified under the grant of June 2, 1864. The lands claimed by Treffey and Roper are within the 6 miles limit and the others within the 20 mile limits. Those claimed by John Bruce[28] had been adjudged the defendant's in error in a former litigation between it and Bruce, and the judgment remaining in full force, was pleaded and proved. They were also within the 15 mile limits, on the north side of the line fixed in 1856 and 1857, but more than 20 miles from the line on which the road was actually constructed. The same state of facts exists as to the land of Duncan[29] and Wm. Bruce[30]. A portion of the land claimed by Brown[31], was certified under the act of May 15, 1856, and a portion under that of June 2, 1864. There is a misapprehension on the part of counsel in this regard. The land is all within the limits of one of the grants, as shown by the maps which were in evidence before the jury, and referred to in this record but not set out in extenso. They were all certified, either under the act of 1856 or under that of 1864, as appeared by the certificates which were introduced in evidence and referred to but not set out in this record.

[8] Case No. 1, Rec., p. 2, fol. 4.
[9] " " 5, " 25, " 46.
[10] " " 6, " 25, " 47.
[11] " " 7, " 26, " 48.
[12] " " 8, " 27, " 49.
[13] " " 9, " 27, " 50.
[14] " " 10, " 28, " 51.
[15] " " 11, " 29, " 52.
[16] " " , " 29, " 53.
[17] " " 13, " 30, " 54.
[18] " " 14, " 34, " 65.
[19] " " 15, " 35, " 67.
[20] Case No. 16, Rec., p. 36, fol. 68.
[21] " " 17, " " 36, " 69.
[22] " " 21, " " 39, " 73.
[23] " " 2, " " 23, " 43.
[24] " " 3, " " 23, " 44.
[25] " " 4, " " 24, " 45.
[26] " " 19, " " 37, " 71.
[27] " " 20, " " 38, " 72.
[28] " " 22, " " 39, " 74.
[29] " " 23, " " 40, " 76.
[30] " " 24, " " 41, " 77.
[31] " " 18, " " 37, " 70.

The case was tried in the Supreme Court of Iowa, upon the record of the first 13 cases. The language of the stipulation is:—

"—upon the same record as those cases, except as modified as herein."[32]

Among these cases were those in which Emery and Tharnish were defendants, and the abstract shows—

—"said land was certified to plaintiff on the list dated in 1870, certifying the even numbered sections, under act of 1864, within twenty miles limit, the only certified list under that act."[33]

The certificates in the record in the Grinnell and Emery cases covered the lands embraced in the Brown case.

It was undoubtedly so held in the lower State Court, and there was no record before the Supreme Court of Iowa, and is none in this court upon which that finding can be reviewed. The questions decided by the Supreme Court of Iowa — the only ones which can be examined here — relate to the construction of the several acts of Congress and of the Legislature of the State of Iowa, under which, the defendant in error claims title. The counsel for the plaintiffs in error insist that the only question presented, is, did the plaintiff acquire title under the act of May 15, 1856,[34] but assigns as error the construction which the Supreme Court of Iowa placed upon the act of June 2, 1864, and the subsequent State and Congressional legislation, in regard to the same subject.

An examination of the history of these grants is necessary to a clear understanding of the construction of the statutes referred to in the decision of the Supreme Court of the State of Iowa. Congress, by an act approved May 15, 1856, made grants of land to the State of Iowa, in alternate sections, to aid in the construction of certain railroads therein,[35] In anticipation of the passage of this act, the Commissioner of the General

[32] See stipulation in the Record, p. 33, fol. 65.

[33] Rec., pp. 41, 42, fol. 78.

[34] Argument for plaintiffs in error, p. 2.

[35] 11th Statutes at Large, p. 9.

Land Office, on the 10th day of the same month, by telegram, suspended "the sale or location of all lands" in the district through which it was supposed the proposed line would run.[36] This order was repeated by letter bearing date May 15, 1856.[37]

The General Assembly was convened in extra session on the 14th July of the same year, and the lands granted by the act of Congress above referred to, were re-granted by an act passed at that session, to the Mississippi and Missouri Railroad Company, to aid in the construction of a railroad from Davenport, by way of Iowa City, Fort Des Moines and Council Bluffs.[38]

A question arose immediately as to the nature of this grant. It was held by the Attorney General of the United States, that while it was a grant *in præsenti*, it remained a float until the line was definitely located; that is, it did not attach to any specific land until such location was made. Accordingly, on the 19th June in the same year, the order withdrawing the land from pre-emption was revoked by the Commissioner of the General Land Office.[39]

On the 17th July, in the same year, the Mississippi and Missouri Railroad Company accepted the grant, and on the 6th day of the following August, a map was filed showing the route or line of that road across the State of Iowa, as appears from the certificate of the Vice President and Chief Engineer of the company made on that day. This map was filed in the office of the Governor of the State of Iowa on the 9th day of the

[36] Exhibit I to Petition, Rec., p. 3, fol. 5, introduced in evidence on the trial in the lower State court, Rec., p. 15, fol. 25.

[37] Exhibit III to Petition, Rec., p. 3, fol. 5, Introduced in Evidence on the trial in the lower State court, Rec., p. 15, fol. 25.

[38] "An act to accept of a grant and carry intb execution the trust conferred upon the State of Iowa by an act of Congress, entitled 'An act making grants of land to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,' approved May 15, 1856." (Laws of the extra session of 1856, chap. 1, p. 1.) A copy of so much of this act as relates to the grant of the Mississippi and Missouri Railroad Company is set out in the Appendix hereto, No. II.

[39] Exhibit to Petition, Rec., p. 5, fol. 8, introduced in evidence in the court below. Rec., p. 15, fol. 26.

same month, and a duplicate in the office of the Commissioner of the General Land Office, on the 11th day of the following September.[40]

On the 4th day of September, 1856, Bernhart Henn, notified the Commissioner of the General Land Office of his appointment as agent of the State of Iowa, and the different railroad companies interested in the grant, and of the election of the State to take as indemnity lands under the terms of the act, the odd numbered sections within fifteen miles of the line as definitely located.[41]

As already remarked, on the 11th day of September, Mr. Henn delivered to the General Land Office, the above mentioned map. It was received and placed on file.

At this point in this history we encounter the first question which arises as to the construction of the act of May 15, 1856. It is clamed in the argument of the plaintiffs in error, that the grant made in the first section of the act referred to was *in præsenti*, in the nature of a float, and did not attach to any specific lands until the line of the road was definitely fixed. So far their position may be conceded. It is claimed further, however, that the grant did not attach to any specific parcels of land, except as to the first 120 sections allowed for the first division of the road, *until the railroad itself was completed.* This is the foundation of their entire argument.

We quote from the argument:

"The title to the lands embraced in the initial sale vested in the Mississippi and Missouri Railroad Company *in præsenti*, from the date of the grant, allthough the lands were then unlocated. When twenty miles of the road were constructed, the title to another quantity of lands not exceeding 120 sections, and included within a continuous length of twenty miles of the road, vested in the company, because such an additional quantity then became subject to sale under the conditions of the congressional grant; and so from time to time as each twenty mile section of the road was completed, the title would vest in

[40] Exhibits X and XI to the Petition, Rec., pp. 6 and 7, fols. 9–12. Introduced in evidence on the trial in the lower State court, Rec., p. 16, fols. 27, 28.

[41] Exhibit XIV to Petition, Rec. pp. 7, 8, fol. 12. Introduced in evidence in the lower court, Rec., p. 16, fol. 28.

the State's grantee to a corresponding division of the granted lands, under the operation of the State grant, without any further act of sale on the part of the State." [42]

The question as to when the title vested *in the State* is studiously ignored, and the only information given as to the theory of the plaintiffs in error, is found in the suggestion that the conditions of the grant were conditions precedent and not subsequent. The purpose of the entire scope of the argument is, to show that the title being in the United States, as to all of the land granted, except the initial 120 sections, it remained subject to sale, and homestead and pre-emption settlement until the railroad was actually constructed. We affirm that the title to all odd numbered sections, within six miles of the line, vested in the State of Iowa, when that line was located on the surface of the earth; and that the title to the indemnity lands beyond the six miles, and within the fifteen miles limits, attached when the selections were made, after the line was located — that is, on the eleventh day of September, 1856. It was the duty of the Secretary of the Interior, who was charged with the execution of the act, to give it a construction.[43] It was indispensible that he should determine when and where the line was definately located, as preliminary to reserving the lands from sale and pre-emption and their certification to the State as contemplated by the statute. As early as March, 1857, he determined the question by holding, in accordance with the opinion of the Attorney General, delivered at his request, that by surveying and marking the line on the ground it was definitely fixed. In the opinion of the Attorney General to which reference is made, that officer held that such location definitely fixed the line; that—

—"so far as regards the present subject matter, that is to give the State the equity and inchoate title to the dependent lands equal in right, at least, to that which any pre-emptor gets by commencing actual settlements; that the State may lose that inchoate title by a change of location just as a pre-emptor would by change of settlement; that the State perfects its inchoate title by filing the plats in the land office, as

[42] Argument for plaintiffs in error, p. 14.

[43] French *v.* Fyan, 93 U. S. p. 171.

the pre-emptor does by a corresponding act, and thus equal justice would be distributed to all parties, the State, pre-emptors and the United States." [44]

It was the judgment of the Attorney General, that the State acquired, by locating that line on the surface of the earth, the same title which a pre-emptor acquires by actual settlement; that a change of the location *before the filing of any plats in the General Land Office* would divest the State of all lands outside of the limits fixed with regard to the amended location, as the pre-emption settler would lose his pre-emption claim by abandoning the settlement; and that this inchoate title, established by fixing the line upon the surface of the earth, becomes a fixed title when the plats are filed in the General Land Office, and thereafter no change can be made in the location of the line by the company or the State, without the consent of the grantor. The Secretary accordingly decided, that by surveying and marking the line on the earth, it was definitely fixed; also, that it could not be changed *after the map* was filed in the General Land Office, without the consent of the proper authorities of the United States. As already appears, the line was fixed upon the surface of the earth prior to August 6, 1856, and the map was filed in the General Land Office on the 11th day of September in that year. The agent of the State in transmitting the map, said:

"I have the honor to hand you herewith a map designating the line of the Mississippi and Missouri Railroad 'as *definitely fixed*' by the Mississippi and Missouri Railroad Company, in accordance with the act of Congress making a grant of lands to the State of Iowa, approved May 15th, 1856." [45]

The acting Commissioner acknowledged the receipt "of the "map of the route of the Mississippi and Missouri Railroad as "*definitely fixed* by the company." [46] He called the attention of the agent to the fact that the Governor had omitted from his

[44] 8th Op. Att. Gen'ls, pp. 17, 32.

[45] Exhibit XVI to the Petition, Rec., p. 8, fol. 13. Introduced in evidence in the lower court, Rec., p. 16, fol. 28.

[46] Exhibit XVII to Petition, Rec., p. 8, fol. 13. In evidence in the lower State court, Rec., p. 16, fol. 29.

certificate the words "definitely fixed under the act of Congress approved 15th May, 1856," and requested that the omission might be remedied by a supplemental certificate to be annexed to the map. The law did not require the use of these words in the Governor's certificate. The acting Commissioner did not *require* their use. There was no request that the line should be relocated or again fixed, and no rejection of the location or of the map. The map was retained and a suggestion made that a supplemental certificate should be forwarded and appended thereto. It was not only retained, but, as we shall presently see, was used as the basis upon which the lands were reserved from sale and upon which the certifications were made. With reference to the line thereon indicated, the Secretary of the Interior, and his subordinate, the Commmissioner of the General Land Office, fixed the location of the grant and determined what lands were embraced within its limits.

On the 3rd day of October, 1856, the Commissioner addressed a letter to the Register and Receiver at Council Bluffs, directing them,

"Upon the filing by the proper State Agent in your office, the line of route for the Mississippi and Missouri Railroad, one of the routes designated in the act of the Legislature aforesaid, to make a succinct report, stating the fact of the filing of the route, the date when filed, the name of the agent and the evidence of his authority. You will, at the same time, send on a carefully prepared list, authenticated by your signature, showing each section and parts of sections within the township and range cut by the line of route." [47]

On the 20th of October, the Commissioner addressed to the Register and Receiver at Council Bluffs, an order withdrawing from pre-emption all lands "within the fifteen mile limits of the "railroad grants made by the act of Congress, approved 15th May, 1856." [48] The Commissioner says in this letter:

"Diagrams showing the exact limits above mentioned, and the routes of the roads now being laid down upon the maps *in this* office, will be forwarded to you as early as practicable."

[47] Exhibit XVIII to Petition, Rec., pp. 8 and 9, fols. 13 and 14. Introduced in evidence, Rec., p. 16, fol., 29.

[48] Exhibit XXIV to Petition, Rec., pp. 9 and 10, fol. 15. Introduced in evidence, Rec., p. 17, fol. 30.

Is it not evident that the diagrams showing the exact limits of the grant were being laid down upon the map with regard to the line shown by the plat filed Sept. 11, 1856? There had been no location of the line other than that disclosed by that map, and the map was the only evidence in the possession of the Commissioner.

On the 15th of the following November, the Register and Receiver at Council Bluffs advised the Commissioner that a map was then on file in their office, certified by the Vice President, Chief Engineer and Secretary of the company, with the certificate of the Governor of the State of Iowa, showing that the same had been duly filed in his office; and, as appeared by the certificate of the late Register, endorsed upon the plat, was filed in the land office at Council Bluffs on the 19th day of the preceding August.[49]

On the 21st day of October, 1856, the Mississippi and Missouri Railroad Company commenced a resurvey of the line disclosed by the map then on file. New stakes were set on this line, and a new map, showing this survey with some modifications and rectifications of the line, was filed in the General Land Office, on the first day of April, 1857. This was not filed as an original map, or as the only one showing the location of the line. It is described in the letter as "an amendatory and supplemental map."[50] The Commissioner, on receiving it, described it as "a supplemental map of the road 'definitely fixed,' " of the Mississippi and Missouri Railroad." His attention being called to certain deflections in the line, he states that the officers of the government would interpose no objection thereto. It is proper to state, in this connection, that these deflections do not affect any of the lands in question; that the line by which their location must be determined, either within or without the grant, was not changed either by the survey or supplemental

[49] Exhibit XXVI to the Petition, Rec., p. 10, fol. 16. Introduced in evidence, Rec , p. 17, fol. 30.

[50] Exhibit XXXIII to the Petition, Rec., p. 11, fol. 18. Introduced in evidence, Rec., p. 17, fol. 31.

map. It seems to have been understood, when the original map was filed, that the line was then fixed under the act making the grant. Next, it was deemed necessary that the executive officers of the government should approve of the modifications. If the line had not been definitely fixed on the face of the earth by the survey, which commenced prior to the 6th August, 1856, and completed by filing the map on the 11th September of that year, why was it necessary to secure the assent of the Commissioner to the proposed changes? If the proposed line had been rejected, as was claimed in the Supreme Court of Iowa, or if it was abandoned by the company, and a new location made under the survey of the 21st October, 1856, and the additional map of April 1st, 1857, there was no necessity whatever for consulting the Commissioner in regard to any changes or deflections. If the first location made was abandoned, his consent to a deviation therefrom in making the new one, was a meaningless concession.

The definite location of the line lay at the threshhold of the execution of the grant, and the first act in such execution was the decision of the Secretary as to what constituted such definite location, and a compliance with the requirements thereof. That decision was within the scope of his authority, and is conclusive not only upon third persons, who then had no interest in the grant, or in any of the lands embraced therein, but upon the government of the United States as well.

The rule as to what constituted a definite location declared by the Secretary, is expressly recognized by this court in the *Railroad Company* v. *Fremont County*. [51]

The act of re-grant required that "the lines and routes of "said road above described, shall be definitely fixed and located "on or before the first day of April next, after the passage of "this act." [52]

[51] Railroad Co. *v.* Fremont Co., 9 Wall., 94.

[52] Act of July 14, 1856. See copy, Appendix No. II.

In passing, it will be well to note that the lands were withdrawn from pre-emption on the 18th day of October, 1856, and there is no pretense that they have ever been restored. They have not, from that day to this, been lands of the United States subject to sale and pre-emption.

In making this certification, the president, who acted through the department officers, exercised the power which has been recognized from the organization of the land department, and the order was effective to withdraw lands from the public domain, subject to sale or pre-emption. It was the uniform custom of the department to suspend sales of lands within the prescribed limits of the supposed routes of railroad to which grants had been made. [53]

The power is expressly recognized by this court in *Wolcott* v. *The Des Moines Company*. [54] In that case Mr. Justice NELSON, in delivering the opinion of the court, said:

"Besides, if this power was not competent, which we think it was ever since the establishment of the Land Department, and which has been exercised down to the present time, *the grant of 8th August, 1846, carried along with it by necessary implication, not only the power, but the duty of the Land Office to reserve from sale the lands embraced in the grant.* Otherwise its object might be utterly defeated. Hence immediately upon a grant being made by Congress for any of these public purposes to a State, notice is given by the Commissioner of the General Land Office, to the Register and Receiver to stop all sales, either public or by private entry. Such notice was given the same day the grant was made, in 1856, for the benefit of these railroads. That there was a dispute existing as to the extent of the grant of 1846, in no way affects the question. The serious conflict of opinion among the public authorities on the subject, made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."

In that case many of the lands reserved were more than 100 miles beyond the limits of the grant as subsequently settled by this court. If it is said that the line was definitely fixed by the river, we reply, for that reason, the discretion of the officer

[53] See letter of Commissioner Butterfield to President Fillmore, Sept. 19th, 1850. Copy in the Appendix hereto, No. IV.

[54] Wolcott vs. Des Moines Co., 5 Wall., p. 688.

was more limited. If the duty had been imposed upon him, to determine the time and place of the definite location of the line, with relation to which the limits of the grant were fixed, his decision would have been conclusive. In that case the line was a natural feature of the country, and was designated by the act of Congress itself. The outer boundaries of the grant were also determined, and nothing was left for the discretion of the officer. In this case the officer who had charge of the execution of the law was compelled to determine when the line was located and where. In the argument in this cause, in the Supreme Court of Iowa, great stress was laid upon the date of Henn's letter to the Commissioner, indicating the election of the State as to the indemnity lands. It is difficult to see what bearing this can have upon the rights of any of the parties. Conceding that the selection was prematurely made, has there not been sufficient ratification and confirmation since? The State and the United States have acted upon the selection for a period of 20 years. The lands were set apart as selected, were certified as selected, and were accepted by the State and its grantee as selected. They have been certified by the proper authorities of the General Government and accepted by the State, and by the State granted to the plaintiffs. That should end the matter, particularly as to third persons, who had no pretense of claim to the property at the time each of these several acts occurred.

On the 8th day of March, 1857, the Mississippi and Missouri Railroad Company executed a deed of trust to Thomas E. Walker, and Curtis B. Raymond, conveying to them as trustees all of its property, including all grants which it should receive under the acts of May 15th and July 14th, 1856.

This conveyance was made in exercise of power conferred by the State of Iowa. [55]

[55] "An act supplemental to an act to accept the grant and carry into execution the trust conferred upon the State of Iowa, by an act of Congress, entitled 'an act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,' approved May 15th, 1856, which said act of the legislature of Iowa was approved July 14th, 1856." Laws of Sixth General Assembly, chap. 182, p. 278, Rev. 1860, secs. 1335, 1337, incl. A copy of this act is set out in Appendix No. III.

On the 27th December, 1858, the proper officers of the Department of the Interior issued in due form to the State of Iowa a certificate setting out a list of lands enuring to the State under the grant of May 15th, 1856, between the six and fifteen miles limits, as shown by the maps filed September 11, 1856, and April 1st, 1857. This certificate recites that the selections are "in lieu of lands in the alternate sections designated by odd "numbers within six sections in width on each side of said road "which the United States had legally sold, and to which the "right of pre-emption had legally attached prior to the period "at which the right of the State enured under said grant."[56]

This certificate was also filed in the counties in which the lands were located.

It does not show when the lands, for which the indemnity was given, were disposed of by the United States, otherwise than by the language, "prior to the period at which the right "of the state enured under said grant."

On the 10th December, 1861, the Mississippi and Missouri Railroad Company executed another mortgage or deed of trust conveying a portion of its property, including the lands granted by Congress to the State of Iowa, to Thomas C. Durant, Jacob S. Wetmore and Robert B. Minlurn, Jr., to secure the payment of moneys borrowed by the company, to aid in the construction of its road. This mortgage was also duly recorded.[57]

On the 2d June, 1864, an act to amend an act entitled, "An "Act making a grant of lands to the State of Iowa in alternate "sections to aid in the construction" of railroads in said State, approved May 15th, 1856, was approved.[58]

It was persistently urged in the Supreme Court of Iowa that the grant made by this act was intended by Congress to be

[56] Exhibit XXXVIII to Petition, Rec. p. 12, fol. 19. Introduced in evidence. Rec., p. 19, fol. 35. See also, "Amendment to Abstract," Rec., p. 32., fol. 61, p. 33, same fol.

[57] Exhibit XLII to Petition, Rec., p. 12, fol. 20. Introduced in evidence, Rec. p. 19, fol. 36.

[58] 13 Statutes at Large, p, 95.

in lieu of that made in 1856; or, in other words, that the grant of 1856 was resumed, and a new grant made in place thereof. In the argument for the plaintiffs in error in this court, the statement, but not the substance, of this proposition is modified. It is now said that the act of May 15th, 1856, was amended by that of June 2d, 1864, in such manner as to restrict the grant to the six and twenty mile limits, with regard to the amended line, which the company was authorized to locate. We propose to examine these acts in the light of the rule stated by Mr. Justice DAVIS, in *The Leavenworth, Lawrence and Galveston Railway Co.* v. *United States*:[59]

"This grant, like that to Iowa, was made for the purpose of aiding a work of internal improvement, and does not extend beyond the intent it expresses. It should be neither enlarged by ingenious reasoning, nor diminished by strained construction. The interpretation must be reasonable, and such as will give effect to the intention of Congress."

The second section of the act provides:

"Whenever such new location shall have been established, the said railroad company shall file in the General Land Office at Washington a map definitely showing such location, and the Secretary of the Interior shall cause to be certified and convey to said company, from time to time, as the road progresses, out of any public lands *now belonging* to the United States, not sold, reserved or otherwise disposed of, etc."

"Out of any public lands *now* belonging to the United "States." Did the lands embraced in the grant of May 15th, 1856, belong to the United States on the 2d June, 1864? The express language of the act of 1856, as construed by this court in *Shulenberg* v. *Harriman*,[60] is to the effect that the title passed out of the United States into the State *on the day* that the line of the road was definitely fixed upon the surface of the earth. This court also said in *The Leavenworth, Lawrence and Galveston Railroad Company* v. *United States*,[61] that the act vests

[59] Leav. Law & Gal. R. Co. *v.* U. S., 92 U. S., p. 740.

[60] Shulenberg *v.* Harriman, 21 Wall., p. 60.

[61] Leav. Law & Gal. R. R. Co, *v.* U. S., 92 U. S., p. 741.

"a present title in the State," * * "though a survey of the "lands and a location of the road are necessary to give pre- "cision to it." If we add to this that which the law does not require—that a map showing such location shall be filed in the General Land Office, the record in this case will show that the title to these lands passed into the State of Iowa as early as September 11th, 1856, and certainly not later than April 6, 1857.

"Not sold, *reserved or otherwise disposed of.*" Were not all of the lands embraced within the fifteen mile limits and belonging to the United States on the 20th October, 1856, when the re-survey was made, reserved by express order of the commissioner of the General Land Office? If they were so reserved, they were not embraced in the grant of June 2, 1864. None of the lands reserved under the act of 1856, though within twenty miles of the constructed line, could enure to the company under the act of June 2, 1864, for the reason that they were not then owned by the United States; or, if owned, had been reserved. If it is true that the act of 1864 made a grant in lieu of that of 1856, its effect would be to give to the company the even numbered sections within twenty miles of the amended line, in exchange for all of the lands reserved by the department under the act of May 15th, 1856. Not a single acre within the alternate sections could enure to the company under either grant, and this is true, even if the two acts be taken as constituting but one. The State can take nothing under the act of 1856, for the new act was in lieu of that. The company can claim none of the lands for sale under the first act, for they were expressly reserved from the operation of this grant, by the language of the act.

Was this purpose on the part of Congress consistent with the fourth section of the act?

"Nothing in this act shall be construed to interfere with, or in any manner, impair any right acquired by any railroad company named in the act to which this is an amendment, or the right of any corporation, person or persons, acquired through any such company; nor shall

it be construed to impair any vested right of property, but such rights are hereby reserved and confirmed."

If the new grant was made in lieu of the original one, there was virtually a resumption by Congress of the original one. It was necessary that Congress should take back that which was granted in 1856, in order to make another in its place. The last clause of section 4 of the act of May 15th, 1856, provides:

"And if any of such roads are not completed within 10 years, no further sale shall be made, and the land unsold shall revert to the United States."

This term of 10 years expired on the 15th day of May, 1866, nearly two years after the approval of the act of June 2d, 1864. Did Congress attempt to resume this grant and substitute another in its place, nearly two years before it had the power to do so? Did the Government of the United States undertake to break its faith with the State of Iowa and its grantee, and attempt by solemn enactments to vary the contract? The perfidy of such an attempt would be equaled only by its impotency. As such a resumption would, in the language of Mr. Justice DAVIS, involve a gross breach of public faith, the presumption is conclusive that Congress never meant to make it.

The rights of the State could not be thus divested without its consent. The grant of 1864 was not made to the State of Iowa, but directly to the Mississippi and Missouri Railroad Company. The control of the State over the application of the lands was dependent upon the failure of that company to complete the road within the time named in the act. The grant of 1856 was directly to the State. Is there any pretense that the State of Iowa desired the surrender of a grant embracing about 400,000 acres of land, the application of which it controlled, in exchange for another embracing about 160,000 acres made directly to the corporation, and divested of State control? Is there the slightest probability that the company itself consented to an exchange of 400,000 acres selected in 1856 for remnants left in 1864, amounting to only about 160,000 acres?

But the State and the Mississippi and Missouri Railroad Company were not the only parties to be consulted. The company had executed mortgages which were then valid liens upon the lands which were embraced in the original grant. Is there any claim that the trustees under these mortgages, or the bondholders whom they represented, ever consented to any surrender of their rights? Would not this alleged resumption, and the substitution of a new grant upon which their mortgages would not be liens, "interfere with," and in some manner "impair" their rights? Did they not have a vested right in these lands which would be "impaired," even if the title was inchoate, by such legislation, and would their rights be "reserved and confirmed" by a resumption attempted two years before any right to resume could exist? This entire construction rests upon the assumption that the State and its grantee were utterly reckless as to their own interests, and both the State and the Government of the United States attempted to destroy the vested rights of the Mississippi and Missouri Railroad Company.

The language which would warrant such a construction of the statute must be strong indeed. Do we find any such language in this act? It was the evident purpose to make an additional grant, and not a substitutional one. The rights of the company itself, and of its grantees, to the lands, were expressly reserved, and the language quoted from section 4 clearly shows that an additional grant was made to the company, embracing the even-numbered sections, which were not included in the first grant. It was so treated by the department, the officers of which certified the additional lands to the Chicago, Rock Island and Pacific Railroad Company directly, as the successor of the Mississippi and Missouri Railroad Company. The circumstances attending the grant, as well as the language of the act itself, rebutts the theory that the act was substitutionary, and an examination of the record of the land department shows that by reason of sales and pre-emption entries, the company fell short over fifty per cent. of the grant contemplated when the act of 1856 was passed.

Section 2 of the act provides that—

—"the Secretary of the Interior shall cause to be certified and conveyed to said company from time to time, as the road progresses, *out of any public lands now belonging to the United States not sold, reserevd or otherwise disposed of,* or to which a pre-emption claim or right of homestead settlement has not attached, and on which a *bona fide* settlement and improvement has not been made, and under color of title derived from the United States or from the State of Iowa, within six miles of such newly located line, an amount of land per mile *equal to that originally authorized to be granted,* to aid in the construction of said road, by the act to which this *is an amendment;* and if the amount of land granted by the original act to aid in the construction of said railroad shall not be found within the limits of six miles from such line, then such selections may be made along such line within twenty miles thereof."

This, instead of showing a grant in lieu, indicates an intention and purpose on the part of Congress to grant lands from the even-numbered sections, in addition to the odd numbered sections granted by the act of 1856, sufficient to make the amount which the company should receive, under both acts, equal to the amount which it was the purpose of Congress to give, out of the odd numbered sections, by the act of 1856.

The provisions in regard to the Cedar Rapids and Missouri River, the Dubuque and Sioux City, and the Burlington and Missouri River Railroads, show a settled purpose on the part of Congress to protect the limits of the *original grant*, and the reasons for this are found in the history thereof.

When the grant was made, it was estimated that the line of which the Cedar Rapids and Missouri River forms a part, would be entitled to 1,248,000 acres, less the deductions on account of the grant to aid in the improvement of the Des Moines River. Prior to the passage of the act of June 2d, 1864, the lands certified to the State for that grant amounted to 775,444.19 acres. It was estimated that the Dubuque and Sioux City line would receive 1,132,800. There was certified to said company, under said grant, on December 27th, 1858, April 7th, 1863, and December 13th, 1864, lands amounting to 1,226,163.49 acres, making the number of acres received by the company

in excess of the grant, estimated at the time of enactment of the law, 93,363.49 acres.

It was also estimated that the line from Davenport by way of Iowa City and Fort Des Moines, to Council Bluffs, would receive 1,113,600 acres. There was certified to the State, at the time of the passage of the act of 1864, 482,494.36 acres—being over 630,000.64 acres less than, and not one-half of, the number of acres which it was estimated the State would receive for that line.

It was also estimated that the company which would construct the road from Burlington to the Missouri River would receive 979,200 acres. June 2d, 1864, there had been certified to the State for it, 287,206.34 acres—less than one-third of the estimated grant.

The foregoing figures form a part of the public records of the government of the United States, and of the State of Iowa, and their correctness cannot and will not be disputed. They should be modified both as to the estimates of the amount of land which the State would receive, and as to those actually certified, by the deduction of the swamp and Des Moines River lands, some of which were embraced in both. The lands certified to all of the companies, embraces the alternate sections within fifteen miles of each side of the roads, including those within five miles of the Des Moines River. The relative amounts, however, will not be materially changed by accurate figures. The actual amount received by the Mississippi and Missouri Company was 388,270.70 acres.

No additional grant was made to the Dubuque and Sioux City Company, *for the manifest reason that it had received the quantity estimated at the time the original grant was made. Additional grants were made to each of the other companies, for the reason that neither had received the estimated amount.* The Cedar Rapids and Missouri River Company, having received a larger proportion than either of its associates in misfortune, was

subjected to limitations not imposed upon them—in being restricted to the original limits of its grant, unless it should be found that the amount of lands intended to be granted, could not be found in such limits, in which case it was permitted to select additional lands within twenty miles. It is apparent that it was then thought probable that the estimated amount might be found in the original limits.

The Mississippi and Missouri, and the Cedar Rapids and Missouri River Railroads, were destined to the same terminus, Council Bluffs.

The southern fifteen miles limit of the grant to the company last named, under the act of 1856, is separated by but a small belt from the northern fifteen miles limit of the Mississippi and Missouri Company, and for a considerable portion of the distance the two limits are located on a compromised line.

A glance at the map will show that a modification of its original line, "so as to secure a better and more expeditious "line to the Missouri river," would apparently throw the new line of the Mississippi and Missouri Railroad Company south of the old one, and in any event throw the twenty miles limit of the new grant south of the northern fifteen miles limit of the original grant. *For the purpose of protecting all the lands south of the last mentioned limit from the operation of this grant to the Cedar Rapids and Missouri River Company, the limits of the latter were fixed with reference to its original line. So careful was Congress to prevent any cloud being thrown upon the title of the Misssissippi and Missouri Company that it incorporated in this section the proviso:*

"And no land shall be conveyed to said company, [the Cedar Rapids and Missouri River,] situate and lying within fifteen miles of the *original line of the Mississippi and Missouri Railroad,* as laid down on a map on file in the General Land Office."

If the lands within fifteen miles of the old, but more than twenty from the new line were to revert to the United States,

what objection was there to their enuring to the Cedar Rapids and Missouri River Railroad Company, if within the terms of the grant to that company? *If it was intended that all of the lands which the Mississippi and Missouri Railroad Company, or its mortgagees and grantees would receive, should lie within twenty miles of the new line, why was it that the land between such twenty miles limit and the original fifteen miles limit were expressly exempted from a grant which would otherwise cover them?* This provision was incorporated in the statute to meet the contingency, of a strip between the old fifteen miles and the new twenty miles limits, and declares the purpose of Congress to protect the rights of the State, and its grantee to the lands located therein.

The Mississippi and Missouri Company, having received the next larger proportion of the original grant as estimated, was protected on the north to the full limit of its original grant, while not being restricted thereto, as was the Cedar Rapids and Missouri River Company, but it was prohibited from receiving lands south of the northern fifteen miles limit of the Burlington and Missouri River Company; while the last named company, having been the least fortunate of the four, received its additional grant without the limitation imposed upon any of the others. If it was not the purpose of Congress to make additional instead of *substitutional* grants, why these discriminations ranged on a scale with reference to the relative proportions of the estimated lands received by the companies? *And why was the Dubuque and Sioux City Company, the most tardy of all, permitted to change its route without forfeiting an acre of the full measure* of its grant, while a similar privilege was conceded to the more prompt and diligent but less fortunate companies, only upon condition that they would abandon their grants received under the act of 1856, and accept in "substitution" therefor the more limited one, in amount, of 1864? If the surrender of the original grant was a consideration paid for the privilege of changing

the line, why was an additional grant made to the Burlington and Missouri River Company without the concession of that privilege?

The last proviso, in section 4, shows conclusively that no resumption was contemplated. It runs:

"That no lands shall be conveyed to any company or party whatsoever, *under the provisions of this act* AND *the act amended by this act*"—

Congress contemplated the conveyance of lands under both acts. The conveyance under the act of 1856 could be made only to the State, and by the State to its grantee. If the first grant was resumed, why were restrictions placed upon the further conveyance of the lands resumed? The proviso continues:

—"which have been settled upon and improved in good faith by a *bona fide* inhabitant, under color of title derived from the United States, *or from the State of Iowa*, adverse to the grant made by this act, *or the act to which this act is an amendment.*"

No *bona fide* settler could acquire color of title under the State of Iowa, to any of the lands granted by the act of 1864, for the reason that the title had been solely in the United States, and a conveyance to the State was not contemplated or provided for. Such color of title could have been acquired as to the lands embraced in the grant of 1856, for the reason that the State was invested with the title. If the last named grant was resumed, why was provision made for this class of claimants? If the lands embraced in that grant were not to be conveyed to "any company or party whatsoever," why this restriction upon a conveyance?

On the 3d day of March, 1875, Congress extended "the "time mentioned in 'act entitled an act making a grant of "'lands to the State of Iowa, to aid in the construction of "'certain railroads in said State' for the completion of the "railroads named in said act," two years.[62]

[62] 13 Statutes at Large, p. 538, chap. 105, sec. 10.

The extension of time to avoid the reversion of a grant already resumed, was an unavailing indulgence.

It is not claimed that any language is used in any part of the act of June 2nd, 1864, which expressly *resumes* the grant of May 15th, 1856. It declares itself in the title an "amendment." The whole scope of the statute shows indubitably that the purpose of Congress was to make an additional grant to compensate the deficit in the amount of lands which it was believed the State and its grantee would receive when the original grant was made. This is also apparent in every detail of the statute, and is developed by the history of the entire legislation upon this subject.

This is also in harmony with the construction which the Department has always, with one exception, to be presently noticed, placed upon these grants.[63]

On the 19th June, 1876, the Commissioner of the General Land Office thus wrote to the Hon. Addison Oliver:[64]

"I will add, in this connection, that it is the custom of this office to certify to the State, under the act of 1856, the lands in the *odd* numbered sections within the old or original 15 miles limits of the road, and to certify to the company, under the act of June 2d, 1864, the lands in the *even* sections within the 20 miles limit of the modified line and the 15 miles limit of the original line; and also the lands in the *odd* sections between the 15 and 20 miles limits."

The lands in the odd numbered sections were certified directly to the company in 1870, after the road was constructed and before these complainants in error made their settlements.

[63] See letter of J. M. Edmonds, Commissioner of the General Land Office, to Register and Receiver at Council Bluffs, under date of June 7th, 1865, Appendix No. V; letter of S. S. Burdette, Commissioner of the General Land Office, under date of January 19th, 1876, Appendix No. VI; letter of L. K. Lippincott, Acting Commissioner of the General Land Office, to Hon. Milton Saylor, Chairman, etc., under date of February 14th, 1876, Appendix No. VII.

These letters show the construction which was placed upon these acts by the Executive Department of the Government, and may be properly referred to, though not formally offered in evidence on the trial in the lower State court. The paragraphs to which the attention of the court is particularly directed are printed in *italic* characters.

[64] A copy of the letter is appended hereto as Exhibit No.

The Blair Town Lot and Land Company v. *Ketteringham*[65] is directly in point. The similarity between the evidence in that case and in these is striking. We copy from the opinion of DAY, J.:

"From the testimony introduced it appears that the Cedar Rapids and Missouri River Railroad was not only located, but built, as far west as the lands in controversy, before the defendant took possession thereof for the purpose of homesteading them, although they were not certified to said company until the 30th of August, 1872. It is not disputed that the lands are within the limits of the grant of June 2, 1864."

The plaintiff's road was not only constructed as far west as the land in controversy, but was finished and operated to the Missouri River as early as June 6th, 1869—three years and a half before these entries were made.[66]

In the case referred to above, the settlement was made before the lands were certified. In the case at bar the settlement was made about two years after the lands granted by the act of June 2, 1864, were certified, and twelve years after the certification of those granted by the act of 1856. In that case it was held:

"The defendant acquired no rights, as against the railroad company, by entering upon the premises in dispute under the homestead act, and his application for the land was properly refused by the Receiver of the Land Office."

The deeds of trust executed by the Mississippi and Missouri Railroad Company were foreclosed by proper proceedings in the Circuit Court of the United States for the District of Iowa; and all of the property mortgaged, including the lands certified, was sold on the 6th day of July, 1866, to the Chicago, Rock Island and Pacific Railroad Company, in Iowa. The deed executed by the special Master in Chancery, who conducted the sale, under the authority conferred by the decree of foreclosure, describes the several parcels embraced in the grant and con-

[65] Blair Town Lot, etc., Co. v. Ketteringham, 43 Iowa, 464.

[66] Cert of Gov. Merrill, Ex. XLIX to the Petition, Rec., pp. 13, 14; Abst., pp. 22, 23, incl., and introduced in evidence in the lower court, Rec., p. 20, fol. 38.

veyed to the purchaser at such sale. That deed was duly recorded in the counties in which the lands were situated.[67]

On the 20th of the following August, the Chicago, Rock Island and Pacific Railroad Company, of Iowa, was consolidated with the Chicago and Rock Island Railroad Company, of Illinois, the new company assuming the name of the Iowa constituent, and receiving all the rights and franchises of every nature and description held by the original organizations. The title of the consolidated corporation is held under the mortgages and conveyances made by the foreclosure, as well as under subsequent legislation by the State of Iowa and the Congress of the United States. Any attempt on the part of Congress to impair the title, otherwise than by resumption of the lands for non-performance of the conditions of the grant, would be futile.

It is said that the mortgages under which the plaintiff holds title, granted only the rights secured to the Mississippi and Missouri Railroad Company under the legislation of 1856; that after the sale of the initial quantity, as authorized by section 4 of the act of May 15th, the State could sell no lands which were not coterminous with the completed portion of the line; that the line was then completed only to Kellogg, a distance of 130 miles from Davenport, and that the company was therefore entitled to lands only within the distance of 130 miles along the line of the road from Davenport.

The provision for the sale of the initial and all other quantities of land is found in the 4th section of the act of May 15th, 1856. The word "coterminous" does not occur in the section. We place the language relating to the initial quantity in a column parallel with that conferring the authority to sell the lands as the road progresses, that the court may see the exact identity:

[67] Exhibit 43, Rec., p. 12, fol. 20; Ex. 45, p. 13, fol. 21. Introduced in evidence in the lower State court, Rec., pp. 19, 20, fols. pp. 37, 38.

AS TO THE INITIAL QUANTITY.

A quantity of land not exceeding 120 sections for each of said roads *and included within a continuous length of 20 miles of each of said roads, may be sold.*

LANDS SOLD FOR COMPLETED ROAD.

The entire quantity of lands hereby granted not to exceed 120 sections for each of said railroads, for 20 continuous miles completed as aforesaid, *and included within a continuous length of 20 miles of each of said roads, may be sold.*

There is no difference whatever between the two provisions as to the location of the land which may be sold.

In the *Courtright Case*,[68] BECK, Ch. J., said: "The "language, 'within a continuous length of 20 miles of each "road,' in the statement of the conditions upon which the lands "may be sold, 'may be understood to limit the selection of land "along the line of the contemplated road; upon this point we "express no opinion.'"

In the *Carroll County Case*,[69] the question avoided in the Courtright Case was considered, and the court divided, BECK, Ch. J., and DAY, J., holding that in this regard there was no difference between the conditions of sale of lands in the initial quantity and those to be sold as the road progressed

Is it again urged, that the words, "within a continuous length of 20 miles of each of said roads," limit the selection of lands along the completed road? Do not the words in the condition as to the initial quantity—"within a continuous length of 20 miles of each of said roads," have precisely the same effect? Why do not the same words in precisely the same arrangement, in the same section of the statute, have the same meaning? This court has said that the initial quantity which must be selected "within a continuous length of 20 miles of said road" may be selected within a continuous length of 20 miles along *any* portion of the located line.

[68] Courtright *v.* The Cedar Rapids & Missouri Railroad Co., 35 Iowa Rep., p. 196.

[69] The Cedar Rapids & Missouri River Railroad Company *v.* Carroll County, 41 Iowa Rep., p. 153.

In the *Courtright Case*[70] this court said:

"Nor was there any restriction upon the State as to where the 120 sections should be selected *along the line of the road*, except that they should be included in the continuous length of 20 miles on each side. They might be selected from a continuous length of 20 miles adjoining the eastern end of the railroad, or the western end, or along the central portion."

In the argument for the plaintiffs in error, great stress is laid upon the provision which requires that the lands shall be sold only as the work progresses. In what manner that can control the place where they shall be selected, we confess our inability to understand. The limitations are distinct, one as to *time*, and the other to *location*, and neither controls or even influences the other.

It is also said that the selection is restricted "within 20 miles *of the road*," and that a surveyed line upon which no work is done, is not a road. The initial quantity is required to be selected within a continuous length of 20 miles of said *roads*. The Supreme Court of the State of Iowa and this court have said that "road," in this connection, is equivalent to "line"—why is it not in the other?

Shulenberg v. *Harriman*[71] is cited by the plaintiffs in error to support the proposition that the company could acquire a valid title to such lands only as were located on each side of the completed road. It was held in that case that lands can be sold by the State only "as the roads, in aid of which the grants were made, are constructed," and "that the road should be constructed in sections of not less than 20 consecutive miles." This falls far short of saying that the lands sold must be in sections coterminous with the completed portion of the line.

In *Tucker* v. *Ferguson*,[72] there is not only no ruling to the effect claimed, but the question was not raised in the case, and

[70] Courtright *v.* The Railroad Co., 21 Wall. Rep., p. 310.

[71] Shulenburg *v.* Harriman, 21 Wall., p. 44.

[72] Tucker *v.* Ferguson, 22 Wall. Rep., p. 527.

it is evident that it was not even thought of by either court or counsel. On the 3d of June, 1856, Congress made grants to the State of Michigan to aid in the construction of certain railroads, including the one from Flint to Pere Marquette, by an act, the terms of which were substantially the same as that making the grant to the State of Iowa, approved May 15th of the same year. The lands granted to aid in the construction of the road named were re-granted by the State to the Flint and Pere Marquette Railroad Company.

By the terms of the act, the lands were "vested fully and "completely in the Flint and Pere Marquette Railroad Com- "pany, according to the provisions of the act of Congress "relating thereto, and the direction of the Board of Control "hereby appointed." [73]

The act further provided that after the completion of twenty continuous miles of road, the company might sell sixty sections of land, and "after the full and final completion of the entire line of its road, and the acceptance by the Board of Control, * * then the company may sell the remainder of the lands." This was subsequently modified in such manner that the company was authorized to sell one hundred and twenty sections on completing twenty miles, and not any before, and to sell the remaining sections when the road was finished through its entire length, and accepted by the Board of Control.[74]

In 1863, the company issued its bonds, secured by a deed of trust, conveying to a trustee 153,000 acres of land.[75]

In 1868, another issue of bonds to the amount of $2,370,000 was made, secured by a deed of trust, conveying the *entire grant*. The projected road was to be 170 miles long, and when these conveyances were made, but 40 miles was constructed. The legislature imposed an annual tax upon the gross receipts of railroad companies, and provided that it should be in lieu of all other taxes,[76]

[73] 22 Wall. Rep., p. 531.
[74] 22 Wall. Rep., p. 535.
[75] 22 Wall. Rep., p. 537.
[76] 22 Wall. Rep., p. 536.

" —except such real estate as is owned and can be conveyed by such corporation under the laws of this State, and not actually occupied in exercising its franchise, and not necessary or in use in the proper operation of its road; but such real estate so excepted, shall be liable to taxation in the same manner, for the same purposes and to the same extent, and subject to the same conditions and limitations as to assessment for taxation, to taxation, and to the collection and return of taxes thereon, as other real estate in the several townships within which the same may be situated."

The trustees in these deeds of trust sought to enjoin a tax levied on the land situated in the county of Osceola, mainly on two grounds:

First. That the property was taken by the State, in trust, to aid in completing the railroad, and it could not claim revenue from it while so held, and before it was sold, in accordance with the conditions of the grant made by Congress.

Second. That the tax was imposed in violation of certain contracts between the State and the company. A demurrer to the bill was sustained by the court below, and in the Supreme Court the following assignments of error were made:[77]

" That the interest of the United States in the lands was not so far extinguished that they were liable to taxation by the State.

" That the State, as trustee, has still an interest in the lands inconsistent with taxation."

The remaining assignments relate to the alleged contract between the State and the company. No distinction was made whatever, between the lands situated adjacent to the completed portion of the line, and those that were many miles away.

The fact that the lands upon which the taxes were levied were in Osceola County, through which the road was completed, made no figure in the case.

On an oral argument in this court, it was announced at bar, by the counsel for the State, that the road was then completed to its western terminus—

" —the counsel for the company still asserting that the State's trusteeship was still so far unexecuted, that the claim providing for the reversion

[77] 22 Wall. Rep., p. 542.

of the lands to the United States, under the act of Congress, was an important factor in ascertaining the extent of the State's responsibility as trustee."[78]

Said Mr. Justice SWAYNE, in delivering the opinion of this Court:[79]

"Upon general principles she could not tax the land while the title remained in the United States, nor while she held them as the trustee of the United States, which, in view of the law, was the same thing, But when the State, proceeding in the execution of the trust, had transferred her entire title to the company, and they had perfected their title and acquired the right to sell, the case assumed a very different aspect."

The State had conveyed to the company a title, which would become perfect on the performance of certain acts, and the question was, could property held by such title be subject to taxation. It was held, that the trust for which the grant was made was not available to third persons, however it might affect a controversy between the State and the United States; and this is all there is of this case. It does not hold, as counsel for plaintiffs in error seem to think, that the lands can be conveyed only along the completed portion of the road, and that no title passes to the State by the grant until the completion of the road.

An examination of the case of *Tucker* v. *Ferguson*, is a very appropriate introduction to the next material fact presented in the history of these grants. When the property of the Mississippi and Missouri Railroad Company was sold under foreclosure on the 9th of July, 1866, the road was completed to Kellogg, in Jasper county, a point 130 miles west of Davenport, and about 43 miles east of Des Moines. Prior to the 13th day of March, 1868, the road was competed to Des Moines.

On the 11th of February, 1868, the General Assembly passed an act,[80] requiring the Chicago, Rock Island and Pacific Railroad Company, to complete its road—

[78] 22 Wall. Rep., p. 543.
[79] 22 Wall. Rep., p. 572.

[80] Laws of 12th Gen'l Assembly, Chap. 13, Sec. 2. For entire act, see appendix hereto, No. VIII.

" —at as early a period as practicable, and within two years from the passage of this act, and to apply the lands heretofore granted by the General Assembly to the Mississippi and Missouri Railroad Company, to the building and completion of said line of railroad, for which purpose the State of Iowa *hereby grants* unto said consolidated railroad company, all right or interest the State may have in said lands."

Here we have an "actual disposition" of these lands.

There were provisions in the bill for a forfeiture of all the franchises, corporate rights and lands granted to aid in the construction of the road, on failure to comply with the requirement that the road should be completed to the Missouri River within two years. *These were conditions subsequent; the title to the property passed from the State to the company by the terms of the act, subject, however, to these conditions.*

The lands were granted to aid in the construction of the railroad from Davenport to Council Bluffs, the grant being in the nature of a float, until the line was definitely fixed, which was done not later than April 1st, 1857. The title to the lands then vested in the *State for a specific trust*, which was a condition subsequent so far as the title of the State was concerned. The State granted them to the Mississippi and Missouri Railroad Company, the grant, however, being dependent upon conditions precedent, the performance of which was essential to passing the title from the State to the company. By the act of February 11th, 1868, the performance of the conditions precedent was *waived by the State*, and all the title which the State had in the property, was transferred to the plaintiff. But, say the learned counsel for the appellants, this property was vested in the State in trust. And is any conveyance to the defendant in error in violation of such trust absolutely void?

This question was presented to the Supreme Court of the United States in *Tucker* v. *Ferguson* [81] already referred to, and upon which the learned counsel for the plaintiffs in error seem to rely with much confidence. In that case Mr. Justice SWAYNE said:

[81] Tucker *v.* Ferguson, 23 Wall. Rep., p. 571.

"If the entire road was not completed within the time limited, no further sales were to be made, and all the unsold land was to revert to the United States. Subsequently the reverter was limited to the land to which the right to sell had not attached. In other words, it was confined to those where the title was inchoate only, and had no application to those where the title was complete. As to those of the former class [that is, as to those where the title was inchoate only] there was not, when the bill was filed, and is not now, any default. *If the fact were otherwise, it would be for the United States, by office found, or other proper proceeding, to assert their rights. But they did not complain, and the complainants cannot do it vicariously for them.*"

In *Baker* v. *Gee*, [82] Mr. Justice DAVIS said:

"It is contended that the Legislature of Missouri had no power to grant privileges of pre-emption. If there was a suit between the United States and the State of Missouri, the question of power would be a proper subject for examination. *But the United States are not complaining, and no other party has a right to complain.*"

In *Shulenberg* v. *Harriman*, [83] also cited by the plaintiffs in error, Mr. Justice FIELD said:

"It is settled law that no one can take advantage of the non-performance of the condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor, if the grant proceed from an artificial person; and if they did not see fit to assert their right to enforce the forfeiture on that ground, the title remains unimpaired in the grantee. The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon conditions proceeds from the government; no individual can assail the title it has conveyed, on the ground that the grantee has failed to perform the conditions annexed."

The same principle has been applied to the misappropriation of lands granted to the several States for the reclamation of swamp lands. [84]

The grant of lands for the reclamation of swamp lands required the appropriation of the proceeds of the sale to a certain trust. In this case the State was required by the terms of the trust to apply the lands themselves to the purposes of the trust.

[82] Baker *v.* Gee, 1 Wall Rep., p. 337.

[83] Shulenberg *v.* Harriman, 21 Wall. Rep., p. 63.

[84] Barrett *v.* Brooks, 21 Iowa Rep., p. 138; Keltner *v.* Story County, 28 Iowa Rep., p. 35; Supervisors of Whiteside County *v.* The States Attorney *et al.*, 31 Ill., p. 68.

The conditions imposed upon the State by both grants were subsequent and not precedent.

It is not necessary, however, to rest on the exclusive right of the United States to complain. Congress has, in express terms, ratified any modifications of the limitations and conditions appendant to the grant of 1856. The act of June 2d, 1864, section 7, provides:

"Sec. 7. *And be it further enacted*, That all the conditions and limitations contained in *the act to which this act is an amendment*, and not expressly changed by this act, shall attach to and run with the grant made by this act, except as said conditions and limitations have been modified, *and may hereafter be modified by the General Assembly of the State of Iowa.*"

"The act to which this act is an amendment" was the act of May 15th, 1856. Here is an express recognition of the fact that the conditions and limitations expressed in that act "have "been modified and may hereafter be modified" by the trustee. It was virtually a waiver of the conditions of the grant of 1856, as limitations upon the power of the trustee. But without regard to this point, if there was an abridgment of the conditions of the trust, complaint because thereof can be made only by the grantor, the United States.

In this view of the case the lands covered by the act of May 15th, 1856, were granted to the State of Iowa and re-granted by the State to the Mississippi and Missouri Railroad Company by the act of July 14th of the same year. They were conveyed by mortgage to secure the repayment of moneys borrowed, to be used in the construction of the road; those mortgages were foreclosed and sales made thereunder July 9, 1866, and by these sales all of the right of the Mississippi and Missouri Railroad Company passed to the purchaser and from such purchaser to this company. If the legal title remained in the State after the definite location of the line in 1856 or early in 1857, until the performance of certain conditions precedent by the company, the performance of those conditions precedent was expressly waived by the act of Feb. 11th, 1858, and the legal title vested in the State

by the location of the line in 1856 or 1857 passed from it to the company, coupled with a condition subsequent, that condition being forfeiture upon failure to complete the road to the Missouri River within two years after the date of the last act. What act of the Congress of the United States or of the State has divested the title thus obtained? By what authority do these plaintiffs who entered upon the land in 1872, in violation of law, question the good faith of the State in the performance of this trust? The United States, and the United States alone, can complain.

The act of Congress of August 3, 1854,[85] provides that when lands—

—" have been, or shall hereafter be, granted by any law of Congress to any of the several States or Territories; and when said law does not convey the fee simple title of such lands *or require patents to be issued therefor;* the lists of such lands which have been, or may hereafter be certified by the Commissioner of the General Land Office, under the seal of said office, either as the originals, or copies of the originals or records, *shall be regarded as conveying the fee simple of all lands embraced in such lists* that are of the character contemplated by such act of Congress, and intended to be granted thereby."

While the statute of May 15th, 1856, did convey a title in fee simple, to become effective as to specific parcels in place when the line was definitely located, it did not require patents to be issued. It therefore became the duty of the Commissioner to issue certificates? All of the lands in controversy, except those on the even numbered sections were certified to the State in 1858, and were re-granted by the State to this plaintiff with a condition subsequent, by the act of February 11th, 1868. That condition subsequent was fully performed, as is shown by the certificate of Governor MERRILL, long before these defendants attempted any settlement.[86] This certificate of the Land Department had the force and effect of a patent to the State.

It is urged, however, that the certificate of the Secretary of

[85] 10 Stat. at Large, p. 346.

[86] The certificate of Gov. Merrell is set out in the Record, p. 13, fol. 22, Exhibit; XLIX to the Petition.

the Interior could not have the force and effect of a patent as to these lands; because they were not embraced in the grants of 1856 or 1864, and further, because the two grants should be taken and considered as one, and the limitation of the last act restricted the extent of the grant made by the first.

We have endeavored to show that the Commissioner of the General Land Office decided in 1856 that the line, with regard to which the grant was fixed, was definitely located, and that the lands were reserved and certified under the grant. We now affirm, that if there was any defect as to the location of the line or the selection of the lands, it was cured, as to all persons who did not have subsisting rights when the certificates were issued, and they now have the force and effect of a patent. Such was the ruling of this Court in *Hoofnagle* v. *Anderson*.[87] Said Chief Justice MARSHALL, in delivering the opinion of the court:

"The title of the respondent to the particular tract included in his patent, was complete before that of the appellants conmenced. It is not doubted that a patent appropriates land. *Any defects in the preliminary steps, which are required by law, are cured by the patent.* It is a title from its date: and has always been held *conclusive against all those whose rights did not commence previous to its emanation.* Courts of equity have considered an entry as the commencement of a title, and have sustained a valid entry against a patent founded on a defective entry, if issued *after* such valid entry was made. THEY HAVE NEVER SUSTAINED AN ENTRY MADE AFTER THE DATE OF THE PATENT. They have always rejected such claims. The reason is obvious. *A patent appropriates the land it covers: and that land being no longer vacant, is no longer subject to location.* If the patent has been issued irregularly, the government may provide means for repealing it, *but no individual has a right to annul it, to consider the land as still vacant, and to appropriate it to himself.*

In *Jackson* v. *Clark*.[88] a similar principle was announced. An act of Congress provided that "no location should be "made on tracts of land for which patents had previously been "issued, *or which had previously been surveyed.*" One party relied upon the fact that his land had been surveyed before the

[87] Hoofnagle *v.* Anderson, 7 Wheat. Rep., p. 214.

[88] Jackson *v.* Clark, 1 Pet. Rep., p. 628.

location was made by his adversary. The attempt was made to avoid the effect of this, by showing that the survey was made upon warrants which had been satisfied, and that it was for that reason illegal and void—as in this case it is argued that the certification is void, because the selection of the indemnity lands was premature. The court said:

"A survey, made by the proper officer, professing to be made on real warrants, bearing upon its face every mark of regularity and validity, presented a barrier to the approach of the location which he was not permitted to pass; *which he was not at liberty to examine * * * The illegality of the survey could not have been examinable by him.*"

The certificates issued by the Secretary of the Interior designated the lands to which the State was entitled under the grant, and has the force and effect of a patent.

The plaintiffs in error made their pretended settlements fourteen years after the certificates for the lands in odd numbered sections and within fifteen miles of the original line, and two years after the certificates for the lands in even numbered sections were issued.

They now rely upon "defects in the preliminary steps which "are required by law," but which are cured as to them, by the certificate, which is "conclusive against all those whose rights did "not commence previous to the emanation." When they made their settlements, the land "being no longer vacant," was "no "longer subject to location." If the certificate was issued irregularly, the government "may provide means for repealing it, "but no individual has a right to annul it, to consider the land "as still vacant and to appropriate it to himself," as these defendants are attempting to do. The act of May 15th, 1856, the location of the line and the certificate "bear upon their face "every mark of regularity and validity," and "present a bar- "rier to the approach of" homestead pre-emptions which these defendants "are not permitted to pass," and which they "are "not at liberty to examine." The illegality of the location, selection, and certification "is not examinable by them."

The decision of the officers of the Land Department as to the location of the line, and what lands are embraced within the terms of the grant, is not only conclusive as to third parties, who had no interest in the land at the time, but is, in general, conclusive everywhere, except upon appeal within that department; and as to the facts upon which the decision is based, in the absence of fraud or mistake, that decision is conclusive, even in courts of justice, when the title afterward comes in question, even between parties who have an interest at the time the decision is made.[89]

The plaintiffs in error had no interest in these lands, and made no claim of any interest, at the time of the location of the line and the certification of the land to the State of Iowa and to the defendant in error, its grantor.

That the title as to the odd numbered sections within fifteen miles of the original line passed from the State to the grantors of the defendant in error, is also apparent upon another view of the case. It will not be disputed that the mortgages executed in 1857, conveyed to the trustees therein named all the title of the Mississippi and Missouri Railroad Company, whether inchoate or in fee absolute. The evidence submitted to the lower State Court shows that when the property was sold under foreclosure in 1856, the road had been completed from Davenport, on the Mississippi River, to Kellogg, in Jasper County—a distance of 130 miles. This fact is apparent on the record in this court, and is admitted in the argument for the plaintiffs in error. The company, upon the completion of 130 miles of road, became entitled to land not exceeding 120 sections, in seven districts, each of which should extend twenty miles along the definitely fixed line. It is argued by the counsel for the plaintiffs in error that the completion of the 130 miles operated to vest the grantee of the State with all of the lands subject to the grant on each side of such completed portion of the road; that

[89] Marquet *v.* Frisbie, 101 U. S. Rep., p. 476; Vance *v.* Burbank, 101 U. S. Rep., p. 519.

is, from Davenport to Kellogg. We have endeavored to show that this court held, in the *Courtright Case*, that the lands may be taken along any portion of the line. A stronger ruling has since been made in *The United States* v. *The Burlington and Missouri River Railroad Company.*[90] Stronger, for the reason that the act under which that case arose provided for the issuance of patents upon the request of the grantee, and provided that they should embrace only lands upon each side of the completed line. Yet it was held that "the position that the "grant was in aid of the construction of each section of twenty "miles taken separately, and must be limited to land directly "opposite the sections, is equally untenable. The grant was to "aid in the construction of the entire road—not merely a por-"tion of it."

When the company had completed seven sections of the road, it became entitled to lands not exceeding 120 sections in seven districts, each of which should extend twenty miles along the definitely fixed line. It therefore became competent to select every acre of land certified to the State, as within the limits of the grant, between the City of Des Moines and the Missouri River. There was no evidence submitted to the lower State court, showing that any lands were ever certified to the State as enuring under either grant, and lying east of the City of Des Moines. It does show that the company was entitled, under the grant from the State, to all of the lands certified prior to the date of sale in July, 1866. It is a reasonable presumption that all certified were appropriated by the State, and conveyed to the company in so far as the same could be lawfully done. The burden was not upon the defendant in error to show, that these specific tracts were selected and appropriated as additional quantities, to which the grantor of the defendant in error became entitled for road constructed, when it is apparent that all such initial and additional quantities consumed all lands

[90] United States v. Burlington & Missouri River R. R. Co., 98 Wall, p. 340.

certified to the State, and applicable to the purposes of the grant. This is not the case of *The Cedar Rapids and Missouri River Railroad Company* v. *Carroll County*,[91] in which it appeared affirmatively, that selections were made for 60 miles of railroad constructed and within the 60 miles along the constructed line, commencing at the initial point of the constructed road and ending at the terminus. In that case the Supreme Court of Iowa very properly held, that while the company is entitled to all the lands within the sixty miles, it could not extend its selections beyond. When the company elects to take title to the lands within any division along the located line for a division of completed road, it is entitled to 120 sections, if the same can be found in the division selected, but it cannot go into any other division for the deficiency. It is not held that the company is restricted to the lands along the completed portion of the road. There is nothing in the decision inconsistent with the ruling of this court in the *Courtright Case*, to the effect that the company may take the lands to which it is entitled in any division along the located line. In this case there is no affirmative showing as to where the selections were made for either the initial or additional quantities. The evidence does show, however, that the company was entitled to all of the land certified to the State at that time, including those in controversy.

This state of affairs existed when the act of June 2d, 1864, was passed, and continued until the sale of July 9th, 1866. It was not competent, therefore, for Congress, even if it were so disposed, to impair the rights of the trustees under the mortgage, by that act; and the purchaser at the foreclosure sale unquestionably took the absolute title to which the mortgagor was entitled at the date of the sale.

It was urged in argument before the Supreme Court of Iowa, that this defendant in error changed the line under the authority

[91] Cedar Rapids & Missouri Railroad Company *v.* Carroll County, 41 Iowa Rep. p. 153.

conferred by the act of June 2, 1864, and that this was equivalent to an abandonment of the lands granted by the act of 1856. It is not claimed that the line was changed east of DesMoines, or prior to the act of February 11, 1868. By that act, the Company became vested with a title which is complete, certainly against all persons except the United States. It cannot be seriously contended that any change of line *after* February 11, 1868, operated to divert any title then held, charged only with the performance of a condition subsequent, which condition has been strictly performed. We have endeavored to show, also, that the company had a complete title under the mortgage and foreclosure sale, independently of the act of February, 1868. If this be true, the failure to complete the road could not disturb the title, and its extension upon a new line could not affect it more unfavorably than a failure to build at all.

On the 31st day of December, 1869, the Governor of Iowa, by certificate under the great seal of the State, declared that the whole line from Davenport to Council Bluffs was completed and in operation on the 6th day of the preceding June. The last paragraph in the certificate is as follows:

"And I do hereby further certify, that the said Chicago, Rock Island and Pacific Railroad Company, by virtue of the purchase at judicial sale as aforesaid, and virtue of an act of the General Assembly of the State of Iowa, entitled 'An act to accept of the grant, and carry into execution the trust conferred upon the State of Iowa, by an act of Congress, entitled An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,' approved July 14, 1856, and by virtue of an act of the General Assembly of the State of Iowa, entitled 'An act providing for and requiring the early construction of the Chicago, Rock Island and Pacific Railroad, from Davenport to Council Bluffs, Iowa, upon certain conditions therein named,' approved February 11th, 1868, *is entitled to receive all the lands granted to the State of Iowa, and to the Mississippi and Missouri Railroad Company, for the purpose of aiding in the construction of a railroad from the city of Davenport, via Iowa City and Fort Des Moines, to Council Bluffs, by the several acts of Congress, entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State,' approved May 15th, 1856, and an act to amend an act entitled, 'An act*

making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State, approved May 15th, 1856,' approved June 2d, 1864.''

All this occurred before the defendants or any of them attempted any settlement upon the parcels which they now claim.

It will be observed that in the act of February 11th, 1868, and in this certificate by the Governor, there is not the slightest intimation of any abandonment of the grant made by the act of May 15th, 1856. After the new line was located, the Governor certified that the Company was entitled to all the lands granted by that act. If that grant had been abandoned, with the consent of the State, what apology can be made for this act and certificate. It must be remembered, in this connection, that if the grant of 1864 was substitutional, it did not and could not transfer a single acre which had been certified under the act of 1856, as the title to that was then in the State or the company, and it was not owned by the United States.

This was the condition of this title in September, 1872, when these plaintiffs in error, in utter disregard of the legislation of Congress, the General Assembly of Iowa and the acts of the Executive Officers of the State and the General Government, and of the fact that the greater portion of the land had been certified for 14 years to the State as enuring to it under the grant of 1856, and that the remainder had been certified to the defendant in error as enuring to it under the act of 1864, attempted to make settlements as homestead claimants.

The act "to quiet the title to certain lands in the State of "Iowa," which took effect January 31st, 1873,[92] had then passed the Senate and was pending in the House of Representatives. That act, by its terms, confirmed to the Mississippi and Missouri and to the Chicago, Rock Island and Pacific Railroad Companies and their assigns "the title to the lands in the State "of Iowa *heretofore approved and certified* by the Department

[92] Copy of this act is set out in the Record, pp. 50, 51, fols. 111, 112.

"of the Interior for railroad purposes, to aid in the construction "of a railroad from the city of Davenport, *via* Iowa City, to "Council Bluffs, under the grants made by Congress, *according* "*to the adjustment thereof made* at the General Land Office."

The court will observe that this act embraces all lands *approved and certified*, whether to the State of Iowa or to the railroad companies, without regard to their distance from any line. Its phraseology also recognizes the existence of two grants, evidently referring to the one made in 1856 and the other in 1864.

What was the effect of this confirmation? This court has answered the question in *The United States* v. *Arredondo.*[93]

"When Congress have, by confirming the reports of Commissioners or other tribunals, sanctioned the rules and principles on which they were founded, *it is a legislative affirmance of the construction put by these tribunals on the laws conferring the authority and prescribing the rules by which it should be exercised;* or—which is to all intents and purposes of the same effect in law—it is a legislative ratification of an act done without previous authority, and thus *subsequent recognition and adoption is of the same force as if done by pre-existing power, and relates back to the act done.*"

If the Commissioner of the General Land Office erroneously decided that the line was definitely located in 1856, his ruling is affirmed and made effective from that date. If the lands were erroneously certified to the State, this act gives the certification "the same force as if done by pre-existing power, and relates back to the act done."

If the Commissioner of the General Land Office erroneously assumed that the act of 1864 was an additional and not a substitutional grant, and that it did not operate to restrict or limit the grant made by the act of 1856, that decision is ratified and approved. The act vests the company with a title evidenced by a more solemn act than a patent executed by an executive officer. "That a grant may be made by law, as well as by a patent pur-

[93] United States v. Arredondo, 6 Pet., p. 713; Grigions' Lessees v. Astor, 15 Pet., p. 454.

"suant to law, is undoubted."[94] It is a higher evidence of title than a patent, as it is the direct grant of a fee by the government of the United States itself. The defendant in error stood in the lower courts of the State with a patent granted by the Congress of the United States relating back to the location of the line, the reservation in 1856, the certification of the greater portion of these lands in 1858 and of the remainder in 1870, under the act of 1864. The act of January 31, 1873, and all of the certificates issued prior thereto, by the Secretary of the Interior, constitute a patent relating back to the last named date, and conveying, *by description*, to the defendant in error, the specific parcels now in dispute. That patent gives the plaintiff a *prima facie* title to all of the lands described in the certificate confirmed.

But it is claimed that these lands are excepted from the grant by the terms of the proviso, incorporated therein. That question will be examined presently; the point we make now is, that if they are so excepted, the burden of proof is upon the defendants. The terms of the grant cover these lands by *specific description*, and until the facts contemplated by the exception are established, we have a complete title to every parcel named in the certificate. In other words, the certificate and the statute show a title in the plaintiff, and it must remain there until it is made to appear affirmatively that they are embraced in the class of lands covered by the proviso.

Let this be applied to the defense made.

1. The defendants say the line was not located until 1867 or 1868. The evidence shows that a line was located in 1856, certainly not later than April 1st, 1857, which was recognized as definitely fixed by the Commissioner of the General Land Office. "This subsequent recognition and adoption is of the same force "as if done by pre-existing power, and relates back to the act "done."

2. We are told that these lands "were settled upon in good

[94] Strother v. Lucas, 12 Pet., 454.

faith," and at the date of the passage of the confirmatory act were occupied by homestead or pre-emption settlers."

We respectully insist that we show a subsisting right in the property in dispute, and have complied with the requirement, (if it is applicable to this case) that the defendant in error shall recover only upon the strength of its own title, unless it has been established affirmatively that they were homestead or pre-emption settlers, protected by the acts of 1856 and 1864.

We now reach the most remarkable of the many remarkable propositions assumed by the plaintiffs in error in the Supreme Court of the State of Iowa. It is founded upon the proviso of the act of January 31, 1873.

"All lands settled upon in *good faith and now occupied by homestead or pre-emption settlers shall be excluded from this act.*"

It is a general rule "which has always prevailed, and be- "come consecrated almost as a maxim in the interpretation of "statutes, *that when the enacting clause is general in its language "and object, and a proviso is afterwards introduced, that proviso is "construed* STRICTLY *and takes no case out of the enacting clause "which does not fall fairly within its terms.* In short, a proviso "causes special exceptions *only out of a clause; and those who "set up any such exceptions must establish it as being within the "words as well as within the reason thereof.*" [95]

There is a clear distinction between a proviso and an exception contained in the purview of an act. An *exception* in a statute must be negatived by pleadings and proofs, but a proviso is matter of defense which must be established by the party who claims under it. "What comes by way of proviso in a statute," said Lord MANSFIELD, "must be insisted on for the pur- "poses of defense by the party accused, but when exceptions "are in the enacting part of the law, it must in the indictment "be charged that the defendant is not within any of them." [96] "Reservations are always something issuing or coming out

[95] United States *v.* Dixon, 15 Pet., p. 165.

[96] Potter's Dwarris, p. 119, note 12.

" of the thing or property granted, and not a part of the thing " itself. *They must be to the grantor and not to a stranger; if to* " *a stranger they are void.*"[97]

If this proviso makes a reservation to any one, it is to the Government of the United States. It leaves the title precisely where it was prior to the passage of the act. If before January 31st, 1873, these defendants had no right which the Government of the United States would respect, they have none now. The lands in the odd numbered sections claimed were reserved on the 20th October, 1856. When the entries were made they had not been subject to pre-emption or homestead entry for fourteen years. The lands in the even numbered sections were reserved in 1864, and certified in 1870. They had not been subject to pre-emption or homestead entry for eight years. Every application to enter or pre-empt them, as shown by the evidence of the plaintiffs in error, was rejected by the local land officers in accordance with the uniform rulings of the department for a long series of years. If the plaintiffs in error had no authorized settlement on the land, they were trespassers, nothing more and nothing less. By what statute have these violators of law been made the wards of Congress? Do the laws of the United States look upon a class against which Congress has legislated since 1807, with such tender regard that the simple fact that land has not been granted to the Chicago, Rock Island and Pacific Railroad Company, causes it to enure them? What words in this proviso vest a title to this property in Grinnell and the other plaintiffs in error? By what language is the land in dispute made subject to homestead entry? It was not subject to such entry when the proviso was enacted, and has not been restored since by any legislative or executive act of the general government. The claims of several of these plaintiffs in error have been passed upon by the Commissioner of the General Land Office and rejected in accordance with the decisions of the Secretary of the Interior.

[97] 3 Wash, Real Prop., p. 370, Sec. 57.

This proviso, in express terms, conveys to the railroad company all "reversionary or other interest, which the United States" then had in the lands. The entire title, at that time, was in the United States, the State of Iowa and the defendant in error—one or all. The plaintiffs in error had no title which the law recognized. One of the three parties holding the title relinquishes to another of the three, for the purpose of concentrating the entire title, and by this act, it is argued, such entire title was vested in a fourth party, who had no legal interest whatever at the time of the transfer.

Congress intended to confirm to the defendant in error all of the title which the United States had at the date of the certificates to all of the lands described in the certified lists. This appears from both the body of the statute and the proviso. Accordingly, "lands which have been settled upon in good faith," and in such manner as to create an inchoate title in the settler, and which were occupied by such pre-emption or homestead settlers, at the date of the passage of the act, were excepted. While the Government of the United States granted all of its title to the lands described in the lists, it declared that such grant should not operate to impair any title as to any of the lands, *then existing* in third persons. If a settlement *authorized by law* had been made in good faith, upon any of the lands, and they were in the hands of pre-emption and homestead settlers, at that date, an inchoate title was established, against which it was provided, that the act should not take effect.

The wisdom and justice of this provision is obvious. The acts of 1856 and 1864 made provision for homestead and pre-emption settlers. Lands claimed by such settlers prior to the passage of this act, were embraced in some of the certified lists. Some cases had been overlooked by the department when the lists were made, and some were not embraced in the lists because they had been rejected. The absolute grant of all lands certified, would, under the decision of this court, convey an absolute title, divested of the claim of the pre-emption or home-

stead settlers.[98] The proviso was evidently incorporated for the purpose of protecting the inchoate rights of pre-emption and homestead settlers recognized by the original grants. The so-called rights of persons claiming, as the plaintiffs in error in these cases, have never been recognized by any law of the United States. Their pretended settlement was an act of wrong-doing, and in the eye of the law could be no basis for any right, legal or equitable. The radical trouble with their claim is, that they had no interest in the property, recognized by law, and in the absence of such right the proviso avails them nothing.

If there were valid homestead and pre-emption settlements at the date of the passage of this act, the title which would revert to the government upon the abandonment of the lands by the pre-emptor or homestead claimants, passed, by the terms of the act, to the company.

If there was an inchoate, outstanding title in a third person, which would ripen into a perfect one, on the performance of certain conditions, the conveyance of the reversionary interest by the reversioner, would operate to transfer the reversion to the company. But this, however, is not the only effect of this act. If it shall be developed that a portion of the lands granted and certified to the State, remained unsold, by the State, when the time allowed for the construction of the road expired, the right to resume reserved in the original grant is relinquished.

If, however, the court could find that a grant by the United States to the Chicago, Rock Island and Pacific Railroad Company, coupled with a reservation to the grantor, could operate to invest the plaintiffs in error, with a title which they never had before, the next question presented would be—have they brought themselves within the terms of the proviso? To do this they must show:

[98] Frisbie *v.* Whitney, 9 Wall., p. 187; Yosemite Valley Case, 15 Wall., p. 77; Shipley *et al. v.* Curran *et al.*, 91 U. S. Rep., p. 339.

1. That they settled upon the lands in " good faith."

2. That they were pre-emption or homestead settlers."

(1.) In what does their alleged good faith consist?

In the Supreme Court of Iowa, it was argued, that " if the plaintiffs in error acted in good faith toward the government and with the *bona fide* intention of making homes " it is sufficient. In the argument in this court to which this is a reply, this question has been studiously avoided. What position will be assumed in the further argument can only be conjectured now.

If the lands claimed by the plaintiffs in error, were, when their several settlements thereto were made, public lands of the United States, they were not subject to homestead or pre-emption entry because they were not subject to sale. The plaintiffs in error became trespassers under the act of 1807. *Did they by violating the laws of the United States, exercise good faith " toward the government?"*

That the lands had been reserved from sale by the proper officers of the United States, is a proposition upon which debate is unnecessary. Such reservation, without reference to any conveyances which have been made by the Government to the State or to the defendant in error, removed the lands from the class upon which pre-emption and homestead settlements could be made. It has been expressly held, as before remarked, by this court, that the inchoate right of a pre-emptor, may be divested by act of Congress. Now suppose A was in possession of one of these parcels, when the act of June 2d, 1864, was passed. His rights were reserved by the terms of the grant. On the 20th of January, 1873, B, by force or stealth, acquired possession and made application to take the land under the homestead law. Would the sole fact that he intended no wrong upon the government, and acted " with the *bona fide* intention of making a "home," avoid the well settled rules as to good faith? Would B be permitted to say that the land was "settled upon in good faith," because his wrongful act was intended to injure A instead of

the government? Will the plaintiffs in error be permitted to say in this case that they acted in good faith because they intended to take the lands in controversy from the defendant in error without injury to the government of the United States?

We will be as liberal as the law will warrant, in defining the good faith demanded by it. Is it unreasonable to say, that it required an *honest belief, founded upon such evidence as was accessable, that the lands upon which the entries were made, were public lands of the United States, subject to homestead entry.* The rule requires more—he must believe that nobody else has any claim upon the property. We will, however, examine the claim as to good faith, with regard to the restricted definition. Did they ever *believe* that the lands were subject to homestead pre-emption? The plaintiff in error, Grinnell, does not make even the pretense of a belief on the subject. The word does not occur in his testimony. On the contray, he admits that when he applied to the local land office, his application was denied. "I think I had also heard that it had once been on the "line of the railroad but the road was completed so it was left "out"[99]. They said they rejected my application because the "land was not in market, because it had been certified to the "railroad." Hammond never made any application to the land office to enter the land which he claims[100]. Ogborn made no application until the winter of 1877[101]. Wilfong made application to the land office to enter and was refused[102]. In all of the other cases the evidence as to the settlement is substantially the same as that of Grinnell.

The rule of law is, that parties relying upon *bona fides* must show something more than ignorance of the true state of title. There must not only be an absence of any knowledge of an adverse claim, but the exercise of legal deligence to ascertain the existence of the same. No man can rely upon the good faith of a purchase, or upon the *bona fides* of a settlement upon

[99] Rec., p. 21, fols. 39, 40.
[100] Rec., p. 26, fols. 47, 48.
[101] Rec., p. 26, fol. 49.
[102] Rec., p. 34, fol. 66.

the lands, without showing, not only that he honestly believed he could acquire a valid title by such purchase, or make a valid settlement, but that he has made such inquiry as a reasonably prudent man would make under the circumstanes, with a view to ascertaining whether or not there was any outstanding claim or title thereto. Thus, in the case of a purchase of lands, the purchaser is required to make inquiry of the party in possession, and if he neglect to make such inquiry, and purchase the land of another person, though honestly believing that he is securing a perfect title, he is charged with the equities of the party in possession; and, as to such party, he cannot rely upon the good faith of the purchase. He is presumed to have the knowledge which he would acquire by making proper inquiries. In the States in which registry laws have been enacted, providing for the registry of deeds and other evidence of title, courts of equity have uniformly held that legal diligence requires inquiry, at the proper offices of registration, for the purpose of discovering whether or not there is any adverse claim; and the record of a deed or other evidence of the title is notice to the subsequent purchaser of the property conveyed thereby, and precludes any claim of good faith in the purchase made, without such examination.[108]

An examination of the records on file in the office of the Recorder of Deeds, in the counties in which these lands were situated, would have disclosed the fact that they were conveyed by order of the Circuit Court of the United States, for the district of Iowa, pursuant to a sale made, under decree of that court, on the 9th day of July, 1866. Further inquiry in the direction indicated in the recitals of the deed itself, would have showed that these land were embraced in the grants made by acts of Congress, of May 15th, 1856, and of the legislature of the State of Iowa, of July 14th, of the same year; and that the title of the purchaser passed through the mortgage executed by the Mississippi and Missouri Railroad Company, in May, 1857.

[108] 1 Story Eq. Jur., 11 Ed., p. 403.

The certificates of the Secretary of the Interior were on record, and would have been discovered, if any examination had been made.

A party entering upon premises, as public lands of the United States, for the purpose of establishing or perfecting a pre-emption or homestead entry, must know that such a settlement can be effected only upon lands that are, actually, the property of the United States *and held for sale.* He must know, further, that the proper office at which to acquire information as to the character of the lands upon which he desires to enter, is the land office of the district in which they are situated; and no entry in good faith, can be made without making inquiry at that office.

The evidence shows that these parties made no such inquiry; that they knew that they were in dispute, and that the land officers refused to receive their applications for the reason that they were claimed by the railroad company. This knowledge rendered a good faith entry impossible.

(2.) Were the lands occupied by pre-emption and homestead settlers?

A pre-emption or homestead settler is one who has made a settlement upon public lands of the United States, *subject to pre-emption or homestead entry*, with intent to acquire title thereto, *by compliance with certain requirements of the laws of Congress.* These were not public lands of the United States, for the title had been divested by the laws of Congress and the certificates issued. Even if the title were in the government of the United States, they were not subject to pre-emption or homestead settlement, for the reason that they had been reserved and set apart from the public domain subject to sale, and this whether the State acquired a title under the act of 1856 or the company under that of 1864. That the lands were set apart and reserved many years before these pretended settlements, and so remained at the time of the same, will not be disputed.

The act of September 4th, 1841,[104] provides that the right of pre-emption shall be subject to "certain limitations and excep-"tions," among which is the following:

"—no lands included in any reservations, by any treaty, law or proclamation of the President of the United States, or reserved for salines or for other purposes,—"

—shall be liable to pre-emption entry. Another section of the same act describes the manner in which "any person" who "has settled or shall settle and improve a tract of land, *subject at the time of settlement to private entry*, shall perfect his pre-emption.

The Homestead Act[105] authorizes a homestead entry of unappropriated public lands, upon which said person may have filed a pre-emption claim, or which may, "*at the time the appli-"cation is made, be subject to pre-emption, at one dollar and "twenty-five cents, or less, per acre.*" The tracts in controversy were not subject to pre-emption, and could not be entered as homesteads.

It must be assumed that the Congress of the United States uses words in their legal sense. The terms "pre-emption settler" and "homestead settler" have a settled meaning in statutes and legal decisions. The word "squatter," as defined by Bouvier—"one who settles on lands of others without any legal authority"—describes the plaintiffs in error with precision. The word is expressive, strong, and sturdy. Why did not Congress use the single word instead of the long sentence? Why say—

"All lands settled upon in good faith and now occupied by homestead or pre-emption settlers, shall be excluded from the operation of this act,"

—when the words—

"All lands settled upon, *by squatters*, shall be excluded from the operation of this act,"

—would have left no room for construction.

[104] 5 Stat. at Large, pp. 445, 457, Secs. 10, 15.

[105] 12 Stat. at Large, p. 392, Sec. 1.

For sixteen years many of these lands had been withdrawn from sale and pre-emption under the act of May 15, 1856. The remainder had been withdrawn for a period of eight years. They had been certified to the State as enuring to it under the grants of 1856 and 1864. Those granted under the act of 1856 had been certified to the company by the Governor of the State, and the completion of the line and the development of the country had greatly increased their value. The "poor settlers" then proposed to acquire them for a nominal consideration, and to consummate the acquisition in the name of equity A similar transaction was thus disposed of by Mr. Justice McLain, in *Foley* v. *Harrison*:[106]

"The circumstances under whieh the plaintiff located his warrants on a very valuable sugar plantation, of which the defendant had long been in possession, does not strongly recommend his equity."

Some effort is made to sustain the title of the plaintiffs in error by an act "to restore certain lands in Iowa to settlements under the homestead law and for other purposes.[107]

This act was approved in 1878, and could not, in any event, affect the title of defendant in error, and it was not the purpose of Congress that it should. It directs the Secretary of the Interior to restore to pre-emption "all vacant unappropriated "lands heretofore withdrawn, for the Mississippi and Missouri "Railroad, in the State of Iowa, situated more than 20 miles "from the amended line of route, as located under the act ap- "proved June 2d, 1864," and provides that "*all actual settlers now* "residing on said lands, shall be permitted to enter, not exceed- "ing 160 acres," etc. The second section provides, "this act "shall not include any lands embraced in the confirmatory act, "approved January 31st, eighteen hundred and seventy-three, "entitled 'an act to quiet titles to certain lands in the State of "Iowa.'"

Let us see what aid this gives to the plaintiffs in error, in

[106] Foley *v.* Harrison, 15 How. Rep., p. 451.

[107] Rec., p. 51, fols. 113, 114.

the construction of the proviso incorporated in the act of 1873.

1. If the same class of settlers were referred to in this act, and in that of 1873, why were they not described in the same way?

Act of 1873.	Act of 1878.
All lands settled upon in good faith, and now occupied by homestead and pre-emption settlers, shall be excluded from the operation of this act.	That all *actual* settlers, now residing on said lands, shall be permitted to enter. * * That all *actual settlers*, now residing upon the lands heretofore mentioned, shall be permitted, etc.

A squatter may be an "actual settler now residing" on lands not subject to homestead pre-emption, but he cannot become a homestead or pre-emption settler in good faith, without making inquiry; neither can he be a "homestead or pre-emption settler" upon lands which are not subject to such settlement.

2d. "This act shall not include any lands embraced in the "confirmatory act approved." What lands were embraced in the confirmatory act? Its terms will answer: "The lands in "the State of Iowa *heretofore approved and certified* by the De- "partment of the Interior for railroad purposes, to aid in the "construction of a railroad from the city of Davenport, via Iowa "City, to Council Bluffs, under the grants made by Congress, "according to the adjustments thereof made at the General "Land Office, be and the same is hereby confirmed." The lands which were "*approved and certified*" are not "included in" the act of 1878. The lands claimed by these plaintiffs in error were so "approved and certified," and are not affected by this act. This last named act seems to have been devised to enable some "actual settlers" who were not "pre-emption or "homestead settlers," to get title to some lands which had been reserved from sale as a part of the grant to the State of Iowa, but which had never been certified to the State or the company. That such an act should be necessary, demonstrates the utter absurdity of the position upon which the plaintiffs in error rely. If the lands which had been reserved, but not certified, could

be restored to market and pre-emption only, by an act of Congress directing such restoration by the Secretary of the Interior, how is it that these plaintiffs in error established valid homestead and pre-emption settlements upon lands which had not only been reserved and certified, but the certfication of which had been confirmed?

When did these plaintiffs in error become "pre-emption set-"tlers?" One of them has never made an application to enter the lands under the Homestad Law, and *not one had made any such application when the act of January 31st, 1873, took effect.* The statute secures to the head of a family, who is a citizen of the United States, the right to "enter one-quarter section, "or less quantity of unappropriated public lands, * * * "which may, *at the time the application is made*, be subject to "pre-emption at one dollar and twenty-five cents, or less, per acre."[108] Were these lands subject to pre-emption at the time these applications were made? It was decided by the Secretary of the Interior, on the 22d of June, 1865, that "the homestead settler's" right *attaches* ONLY *from the date of entry*, the pre-"emption from the date of his actual personal settlement."[109]

This decision was disseminated by Circular Letter. It was also communicated to Congress in the Report of the Commissioner of the General Land Office for 1867. We are not advised that Congress sought to change this construction by amendatory or explanatory legislation. It follows that on January 31st, 1873, these defendants had not taken the first step necessary to make them "homestead settlers." Their rights had not "attached," because the applications to enter the lands had not been made. The pre-emption settler may exist before application, because his right dates from his *settlement*, but the law recognizes no man as a "homestead settler" whose right, as such, has not "attached" by application to enter unappropriated

[108] An act to secure homesteads to actual settlers on the public domain, May 20, 1862, Sec, 1, 12 Stat. at Large, p. 392.

[109] 2 Lester's Land Laws, p. 261.

public lands, "subject to pre-emption at one dollar and twenty-five cents, or less, per acre." If settlement upon land not "subject to pre-emption," with the intention to make an application to enter it, as a homestead, makes a "homestead settler," any squatter upon private as well as public property, may thus acquire inchoate homestead rights, with regard to any land, without reference to the condition of its title. These parties were not, on the 31st day of January, 1873, homestead settlers, because: 1. The lands claimed were not subject to pre-emption: 2. They had made no application to enter them under the homestead law.

Many of the questions herein discussed have been determined by the decisions of the Secretary of the Interior, on appeals taken from the decisions of the Commissioner of the General Land Office, on the applications of some of the plaintiffs in error to perfect homestead entries upon the lands now in dispute in this case.[110] Some of them were also determined by the Circuit Court of the United States for the District of Iowa,[111] in an opinion in which DILLON and LOVE, J. J., concurred. With the exception of one decision made by Commissioner Burdett, of the General Land Office,[112] there has been a uniform line of decisions against the plaintiffs in error, by the Register and Receiver of the Land Office in the Des Moines district, the Commissioner of the General Land Office, and the Secretary of the Interior. Their claims have been defeated in the lower courts in the State of Iowa, in the Circuit Court of the United States for the District of Iowa, and in the Supreme Court of that State.

In the Tomlinson and Bruce cases, former adjudications, relating to the same subject matter, and between the same parties,

[110] See copies of these opinion, in Appendices hereto, Nos. IX, X, XI, XII and XIII.

[111] Drury *v.* Hollenbeck, Appendix No. XIV.

[112] See Appendix hereto, No. XI. This was overruled by Secretary CHANDLER (Appendix No. XII), in an opinion which has since been followed by Secretary SCHURZ (Appendix No. XIII).

were pleaded and proved, and the verdict in each was that the plaintiff, the defendant in error here, was "the owner, and entitled to immediate possession" of the property in controversy.

These cases are submitted, in confidence that the decision of this court will be in full accord with those heretofore made by the Executive Officers of the Federal Government, the Federal courts, and the courts of the State of Iowa.

THOS. F. WITHROW,

For the Defendant in Error.

DISCREPANCY IN PAGINATION

Or

PAGES MISSING

And

CANNOT BE FOUND

APPENDICES.

No. I.

RULES OF SUPREME COURT OF IOWA.

"SEC. 19. In all causes the appellant shall file in this court, at least fifteen days before the first day of the term of the court for which the cause is to be docketed for trial, ten printed copies of an abridgment or abstract of the record in the cause, *setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision.* The appellant shall also deliver a printed copy of said abstract to the attorney for the appellee; and if there be more that one appellee, to the attorney of each; and the cause shall not be heard until fifteen days after such delivery. In case of cross-appeals, the party first giving notice of appeal shall be considered, for the purpose of this rule, the appellant in the Supreme Court. The abstract shall be prepared and printed as required by sections 97, 98 and 99, and no case shall be docketed or submitted to the court, unless this and other rules have been complied with.

* * * * * * * * *

"SEC. 21. [After prescribing what shall be embraced in the transcript, continues]: But the parties may agree, in writing, to submit the case upon the printed abstracts, as provided in section 20 hereof."

[Statutes and Rules relating to practice in the Supreme Court of the State of Iowa, adopted August 4th, 1870, and revised at the June Term, 1877, 43 Iowa Reps., p. 693.]

No. II.

"*AN ACT to accept of the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,' approved May 15, 1856.*

"SECTION 1. *Be it enacted by the General Assembly of the State of Iowa*, That the lands, rights, powers, and privileges granted to and conferred upon the State of Iowa by the act of Congress entitled, 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State,' approved May

15, 1856, be, and the same are hereby, accepted upon the terms, conditions, and restrictions contained in said act of Congress.

"SEC. 2. * * * * * * * * *

"SEC. 3. That so much of the lands, interests, rights, powers, and privileges as are and may be granted and conferred, in pursuance of the act of Congress aforesaid, to aid in the construction of a railroad from the city of Davenport *via* Iowa City and Fort Des Moines to Council Bluffs, are hereby disposed of, granted, and conferred to and upon the Mississippi and Missouri Railroad Company, a body corporate, created and existing under the laws of the State of Iowa.

"SEC. 4. * * * * * * * * *

"SEC. 5. * * * * * * * * *

"SEC. 6. The lines and routes of the several roads above described shall be definitely fixed and located on or before the first day of April next, after the passage of this act, and maps or plots, showing such lines and routes, shall be filed in the office of the Governor of the State of Iowa, and also in the office of the Secretary of State of the State of Iowa. It shall be the duty of the Governor, by affixing his official signature, to file such map in the department having the control of the public land in Washington; such location being considered final only so far as to fix the limit and boundary within which lands may be selected; and if it shall appear that the lands have been donated by the act of Congress aforesaid, for the construction of the several lines above indicated, cannot be obtained by said companies within the limits and along any part of the line aforesaid, the governor shall from time to time appoint agents to make such selections as may be authorized or granted by Congress for the lines aforesaid; but the compensation of such agents and the costs, expenses and charges attendant upon and occasioned by making such selections, shall be fixed, regulated, paid, and borne by each of said railroad companies respectively, upon and for its own line.

"SEC. 7. The Iowa Central Air-Line Railroad Company shall furnish, equip, and operate the branch of their railroad that will be constructed under this grant from Lyons City to the point of intersection with the main line of their road, near Máquoketa, in the same manner with their main line from the west, and as completely as though the same was a continuation of said main line, and shall never give any preference to the main line of said road, or any part thereof, as defined in their articles of incorporation, by business arrangements, tariff of prices, or otherwise, over the said branch of their railroad.

"SEC. 8. The grants aforesaid are made to each of said companies respectively, upon the express condition that, in case either of such railroad companies shall fail to have completed and equipped seventy-five miles of its road within three years from the first day of December next; thirty miles in addition in each year thereafter, for five years, and the remainder of their whole line of road in one year thereafter, or on the first of December, A. D. 1865, then and in that case it shall be competent for the State of Iowa to resume all rights

conferred by this act upon the company so failing, and to resume all rights to the lands hereby granted and remaining undisposed of by the company so failing to have the length of road completed in manner and time as aforesaid.

"SEC. 9. The roads aforesaid shall be constructed upon a gauge with a width of four feet eight and one-half inches, and the iron used in the track shall be of approved quality and pattern, and the said roads shall be completed and finished in a style, and of a quality equal to the average of other first-class western roads, and when the roads, or any of them, authorized to be constructed by this act, shall be intersected by the roads of any other railroad company now constructed, or hereafter to be constructed, it shall be the duty of such road or roads receiving the benefit of this act, to furnish all proper and reasonable facilities, and to join such other company in making all necessary crossings, turnouts, sidings and switches, and other conveniences necessary for the transportation of all freight and passengers over either or any road or roads hereby mutually accommodated, whether said passengers or freight are brought by the roads benefited by this act, or any other road or roads now constructed, or which may hereafter be constructed, and at such rates as shall not in any case exceed the regular tariff of charges on such road or roads.

"SEC. 10. All persons who, at the time said grant was made, held valid claims by actual occupation and improvement upon any of the lands embraced in said grant, shall be protected in the same, and entitled to purchase and enter the same upon the terms and conditions hereinafter provided.

"SEC. 11. Any person, wishing to avail himself of the provisions of this act, and shall, within three months of the passage thereof, file his application for that purpose with the judge of the county where such lands may be situate, and shall prove to the satisfaction of said judge that his claim is valid, and that the same existed at the time said grant was made; and upon such proof being made, such judge shall give to the applicant a certificate of the fact, and such certificate shall entitle the holder or his *bona fide* assignee to enter such land at the rate of two dollars and fifty cents per acre: *Povided*, That no person, claimant, or the assignee of a claim, shall be entitled to more than one hundred and sixty acres of land under this act; and *provided further*, that the person asserting a claim, whether as claimant or assignee, shall file his affidavit that he has not, either directly or indirectly, received the benefits of the provisions of this act. Before any rights shall be acquired under such certificate, a copy of the same, together with the evidence, shall be served on the secretary of the company interested, and such company shall have the right to appeal from the decision of such judge to the district court, in the same manner as appeals are taken from the decisions of justices of the peace, at any time within ninety days after the service of such papers, and the same shall be tried as other appeal cases, and an appeal may be taken to the supreme court, by either party, in the same manner as appeals in other cases.

"SEC. 12. Such certificate, on being filed with the secretary of the company upon whose line of road such lands may be situate, when no appeal has been taken as herein provided, shall entitle the holder or his assignee to the possession of said land, until the title shall become vested in the company. Upon payment thereafter to the treasurer of the company for said land at the price above designated, such person shall receive from the secretary of the company a patent to such land, not exceeding in quantity one hundred and sixty acres. Such deed or patent shall vest in the purchaser all the title of said company in and to such lands, except so far as to reserve to the company all such right of way and station grounds as may be actually necessary for the uses of the company.

"SEC. 13. The said companies shall each severally assent to and accept the provisions of this act by a written instrument, under the seal of such corporation, with the signatures of the proper officers, within ninety days after the passage of this act, which said acceptance shall be filed in the office of the Secretary of State, and be by the secretary recorded in the book kept by him for the recording of articles of association.

"SEC. 14. Said railroad companies, accepting the provisions of this act, shall at all times be subject to such rules and regulations as may from time to time be enacted and provided for by the general assembly of Iowa, not inconsistent with the provisions of this act, and the act of Congress making the grant."

"SEC. 15. It shall be the duty of the companies receiving the benefits of this act to make a regular annual report of their proceedings at the usual time and place of electing their officers, exhibiting a detailed statement, as far as practicable, of the amount of their expenditures, liabilities, &c., a copy of which shall be filed in the office of the Secretary of State.

"SEC. 16. *And be it further enacted*, That any of said companies accepting the grants of lands under this act, shall take the same with the conditions imposed and incumbrances specified in this act, and shall in no event have any claim or recourse whatever upon the State of Iowa, for a misapplication of said grant, incumbrances or conditions in this act imposed.

"SEC. 17. This act shall take effect and be in force from and after its publication in the Iowa *Capital Reporter*, and Iowa City *Republican*.

"Approved July 14th, 1856."

No. III.

"AN ACT supplemental to an act to accept the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress, entitled an act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State, approved May 15th, 1856; which said act of the Legislature of Iowa was approved July 14, 1856.

"SECTION 1. *Be it enacted by the General Assembly of the State of Iowa:* That the said companies may make such disposition of the lands granted by the act to which this is a supplement, by mortgage or deed of trust, as may be deemed proper, for the purpose of securing any amount of construction bonds necessary for the completion of such roads, which may bear such rate of interest, not to exceed ten per cent. per annum, and may sell the same for the best price that can be procured. Said companies, nor either of them, shall ever be allowed to plead that such bonds were usurious or invalid, *provided*, that the moneys realized from the sale of the bonds aforesaid shall be applied exclusively to the construction and equipment of said roads.

SEC. 2. Any mortgage or deed of trust made upon the lands, roads, or the property of either, shall bind and be a valid lien upon all the property mentioned in such deed or mortgage, including rolling stock; and the purchasers under a trustee's sale or foreclosure of mortgage, shall have and enjoy all the rights of a purchaser on execution sale; *provided further*, that nothing contained in this act shall be so construed as in any manner to interfere with, change or modify the rights of this State or the United States to any lands granted by Congress to this State, and by this State to certain railroad companies therein, as a security for the completion of said roads, or to transfer any right in said lands, otherwise than as subject to all the conditions imposed by the grant made by the United States to this State, and by the grant by this State to said companies, or by either of said grants: and *provided further*, that the faith of the State is in no way pledged for the payment of said bonds.

"SEC. 3. Any mortgage or trust deed made as before mentioned, shall be recorded in the office of the recorder of each county through which said road runs, or wherein it owns or holds lands, and shall be notice to all the world of the rights of all parties under the same.

Passed January 28th, 1857; took effect January 17th, 1857. Laws of the 6th General Assembly, chap. 182, p. 278; Rev. 1860, §§ 1335 to 1337, incl.

No. IV.

"GENERAL LAND OFFICE,
"September 19th, 1850.

"His Ex'y M. FILLMORE,
"*President of the United States:*

"SIR: I have the honor to acknowledge the receipt of the letter from several members of the Senate and House of Representatives,

referred by you to this office, asking that the sale of the lands within twenty-five miles of the supposed route of the railroad from Chicago to Mobile be suspended for six months, or until the lands shall have been located, in order that the act may be fully carried out that was recently passed by Congress, 'granting the right of way and making a grant to the States of Illinois, Mississippi and Alabama, in aid of the construction of that road'; and in accordance with your instructions, beg leave to report:

"That, so far as I have been able to examine the question, no authority has been specifically conferred upon the President by law to suspend the sale of lands in cases of this character, where they have been proclaimed and offered at public sale. It would appear, however, that he has always been considered as having that authority by implication, from the nature of the duties devolved on him by the whole system of laws making provision for the sale and disposition of the public domain. For the cases among others, in which this authority has been exercised by the President, I refer to a letter from this office to the register at Piqua, Ohio, on the 28th September, 1828, and which is as follows, to wit:

"The President having been advised by the governor of Ohio that the route of the canal from Dayton to Lake Erie by the Maumee, will probably pursue the course of the Auglaize river from the head of some one of its branches to its mouth, he had directed that the lands lying on the same, and to the extent appropriated by the act passed the 24th of May last, be reserved from sale till further advised. The governor of Ohio has been requested to designate to you that branch of the Auglaize on which the canal will most probably be located.

"With respect, &c.,

"GEO. GRAHAM,

"*Commissioner.*"

"Similar instructions were issued by Commissioner Blake to the land office at Green Bay, on the 11th April, 1844, for reserving the lands along the Wisconsin and Fox rivers, in anticipation of the passage of an act making a grant for the improvement of those rivers; and the reservation then ordered was extended by instructions to those offices of the 8th of August, 1846, the day on which the law was passed by Congress making the grant.

"In many other cases the same authority has been exercised, but to a less extent; the foregoing, however, being of an early and late date, are deemed sufficient to show that the President has always been regarded as having this authority; and as it has thus been exercised, and in the present case must of necessity be inferred to enable the Executive to secure to the States mentioned, and the General Government, the benefits conferred by the law, and thus carry out the intention of Congress in passing it, I respectfully recommend:

"That instructions be issued to the land offices in Illinois to withhold from sale, or location of any kind, till further ordered by this office, all the lands belonging to the Government within

three full townships, or eighteen miles on each side of the supposed line of this road; and that the land offices in Mississippi and Alabama be instructed to withhold, in like manner, all the lands within four full townships, or twenty-four miles, on each side of said route.

"The lands can be suspended from sale much more conveniently by townships than by any other given distance; and the reasons for recommending the withholding of a less extent in Illinois than in the other States is, that the lands in that State are more sought by actual settlers at this time, than in the others, and the general route that the road will pass can be more nearly ascertained. All of which is most respectfully submitted.

"With great respect, your obedient servant,

"J. BUTTERFIELD,

"*Commissioner.*"

No. V.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, June 7, 1865.

Register and Receiver, Council Bluffs, Iowa.

GENTLEMEN: On receipt hereof, you will allow no entries for homestead, pre-emptions, or locations, for any purpose, in your district, on the even numbered sections *lying within the 15 mile limits, as fixed under the act of the 15th May, 1856, and shown on the diagrams heretofore furnished your office, nor upon any of the sections, odd or even, within the additional 5 miles, or 20 mile limits, on each side thereof, granted by act of June 2d, 1864*, of the following railroads, viz:

The Burlington and Mo. River Rail Road.

The Mississippi and Mo. River Rail Road.

The Cedar Rapids and Mo. River Rail Road.

In the meantime, any entries or locations which have been permitted by you under existing instructions subsequent to the 2d June, 1864, except those of prior inception, will be held in suspense for investigation and adjustment at this office.

You will please acknowledge the receipt of this letter.

Very respectfully,

J. M. EDMUNDS, *Commissioner.*

No. VI.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Jan. 19th, 1876.

HON. ADDISON OLIVER, *House of Representatives.*

SIR: I am in receipt of your letter of the 28th ult., relative to the Cedar Rapids and Missouri River Rail Road Company, its road, and the land granted to, or for, and received by said Company.

By the Act of Congress approved May 15, 1856, (Stat. at Large, Vol. 11, page 9;) lands were granted to the State of Iowa for the purpose of aiding in the construction of certain railroads, among others, one "from Lyons City northwesterly to a point of intersection with the main line of the Iowa Central Air Line Rail Road near Maquoketa, thence along said line running as near as practicable to the forty-second parallel across the said State to the Missouri River.

There is on file in this office a letter dated Nov. 19th, 1862, from Samuel J. Kirkwood, Governor of Iowa, giving a brief history of the grant of lands to the State in trust. From this letter it appears that the lands were granted by the State to the Iowa Central Air Line Rail Road Company July 14th, 1856, subject to certain conditions.

On the 1st of Dec., 1859, no portion of the road had been completed, and the affairs of the Company were in a hopeless condition. In the meantime another Company, the Chicago, Iowa and Nebraska, had built a road, commencing at Clinton, on the Mississippi River, only two miles from Lyons City, to Cedar Rapids. The Legislature of Iowa, by Act of March 17, 1860, resumed control of the land, and by Act of March 26, 1860, granted the same to the Cedar Rapids and Missouri River R. R. Company upon certain conditions. At the time of writing the letter, Nov. 19, 1862, Governor Kirkwood claimed that the Company had complied with the conditions of the act.

It was the practice of this office and department to certify the lands granted to the State for railroad purposes, by the act of May 15, 1856, to said State, prior to the construction of the road, or any portion thereof. This action was in accordance with the opinion of the Attorney General (Hon. J. S. Black) dated June 7, 1857, to the effect that the grant to the State vests in said State the title to the lands granted. In accordance with this opinion, there were approved to the State of Iowa prior to June 2d, 1864, 775.717$\frac{61}{100}$ acres * for the benefit of the Iowa Central Air Line Rail Road Company.

By the 4th Section of the act of June 2d, 1864, (Statutes at Large, Vol. 13, p. 96) the Cedar Rapids and Missouri River Rail Road Company was permitted to modify or change the uncompleted portion of its line. *I will add in this connection that it is the practice of this office to certify to the State under the act of 1856 the lands in the odd numbered sections within the old or original 15 mile limits of the road, and to certify to the Company, under the act of June 2d, 1864, the lands in the even sections within the 20 mile limits of the modified line, and the 15 mile limits of the original line; also the lands in the odd sections between the 15 and 20 mile limits.* I will also add that there is on file in this office a certificate dated July 2d, 1867, signed by W. M. Stone, Governor of Iowa, stating that the Cedar Rapids and Missouri River Rail Road Company had constructed a branch road from Lyons to Clinton, as required by the Act of June 2d, 1864.

* This includes 109,756, 85-100 acres lost by the decision of the U. S. Supreme Court, (Dec. Term, 1866,) in the Des Moines Improvement grant which quantity must be added to deficiency of land to satisfy the grant.

It is also understood that the Cedar Rapids and Missouri River Rail Road Company is the successor of the Iowa Central Air Line Rail Road Company, and the lands certified by this office to the State of Iowa for the latter company are regarded as inuring to the grant for the former company. As before stated, the lands were certified to the State, subject to her disposal, and while it is understood that the Cedar Rapids and Missouri River Rail Road Company have only actually built the road west from Cedar Rapids (or from the western terminus of the line built prior to 1864), with the exception of the line from Lyons to Clinton, yet it received the benefit of the lands certified to the State east of that point in accordance with the laws of Iowa. At all events, if such is not the case, this office is not in a position to question the State as to the disposal, by her, of the lands granted.

With this preliminary statement, and with the aid of the map and copies, with the orders, etc., transmitted, I will endeavor to reply to your questions in detail.

Your first question is:

"What quantity of lands has the Cedar Rapids and Missouri River R. R. Company of Iowa received title to under the act of 1856, and what quantity under the amendment of June 2d, 1864?"

Under the act of 1856, it is estimated that the quantity of lands embraced within the limits of the grant is 1,298,730 acres; of this quantity it is estimated that the Company will receive 800,000 acres, of which 782,250 acres have been certified. Under the Act of June 2d, 1864, it is estimated that the Company will receive 356,988 acres, of which 349,683 acres have been certified.

Your second question is:

"Where does the 'modified line' of said Company, under Act of June 2d, 1864, begin, and terminate? How long is it, and how much land has it received therefor?"

The modified line begins at Cedar Rapids, or near there, at the western terminus of the line built prior to 1864, and terminates at Missouri Valley, indicated on the map by the letter D. The certificate of the Governor of Iowa states that 271$\frac{6}{100}$ miles of road has been constructed.

The Company has received 1,131,933 acres.*

The lands certified east of Cedar Rapids are included in this quantity. The Company was not required by law to file in this office a map of constructed road. The certificate of the Governor of Iowa stating that the road had been constructed, is the authority required for certifying the lands under the act of June 2d, 1864. On the map transmitted the original line is marked Q. B., and is colored red; the 'modified line' is marked C. D., and is colored green. This is the line of the 'general route,' but it is also understood to be the line of constructed road. The Company has claimed no lands north of the 20 mile limits of the original line (also indicated on the map,) as north of said 20 miles line. On the south the grant is limited by the 15 mile compromise line.

* This includes the 109,757 84 100 acres of lost Des Moines land.

Your third question is:

"Where does the 'Onawa Branch' of said Company under the act of 1864 begin and terminate? How long is it, and how much land has it received therefor?"

The act of 1864 would seem to contemplate the construction of a branch from the main line east of Onawa City, and from that point to said city, This line is indicated on the map by the letters E. F. It is alleged that the route was impracticable, and the road was never built. It appears that a road was actually built for the Cedar Rapids and Missouri River R. R. Company on a line indicated on the map D. G., or from Missouri Valley to California Junction. This branch connects the main line of the Cedar Rapids and Missouri River Rail Road with the Sioux City and Pacific Rail Road (the Iowa branch of the Union Pacific Rail Road), passing through Onawa City. It is claimed by the Company that the consolidation of this branch with the Sioux City and Pacific Rail Road, under the State laws, for valuable considerations, and inducements, one of which was that the said Sioux City and Pacific Rail Road to Onawa City become virtually, by said agreement, an extension of the Cedar Rapids and Missouri River Rail Road to Onawa City, was, for all practicable purposes, intended by the act of Congress of June 2d, 1864, a compliance with the law requiring said branch to be built. This is called the 'Onawa Branch,' and is about six miles long. No lands have been certified to it, as such branch. The lands within the limits of the same, and also within the limits of the branch, indicated by the letters E. F., (not constructed) are within the limits of the main line, and have been certified, or are subject to certification for said main line.

Your fourth question is:

"For how much and what road (other than the 'modified line') and 'Onawa Branch' has the company received lands, and how much land has it received therefor under the Act of 1856, and how much under the amendment of 1864?"

The lands have all been certified for the Iowa Central Air Line Rail Road Company, or its successor, the Cedar Rapids and Missouri River Rail Road Company, to aid in the construction of the line from Lyons City to the Missouri River, as authorized by the act of May 15th, 1856, and June 2d, 1864. It has received 782,280 acres under the act of 1856, and 349,683 under the act of 1864, as follows:

326,721	71-100 acres	July 18, 1868.
15,684	97-100 acres	April 20, 1869.
906	41-100 acres	Sept. 2, 1872.
480	acres	Nov. 14, 1873.
2,218	69-100 acres	July 26, 1874.
3,265	22-100 acres	April 6, 1875.
406	acres	Nov. 16, 1875.

These lands were approved by the Secretary of the Interior. About 800 acres were erroneously certified, and should be deducted from the amount given as received by the company.

Your fifth question is:

"Were any lands reserved by the Secretary of the Interior as inuring to said company under the Act of 1864, and if so, for what road, at what time, and how much at each time?"

The lands were withdrawn by order of the Secretary of the Interior June 16, 1864, for railroad purposes. Copy of order enclossd marked "A."

They were not reserved for any company by name, or in any specified quantity, but all the lands within the limits of the grants were withdrawn at date above given.

Your sixth question is:

"Were any lands selected by said company as inuring to it under grant of 1864, and if so, for what parts of its road, at what times, and how much at each time, and were such selections approved, and if so, by whom?"

The Cedar Rapids and Missouri River Rail Road Company has selected lands as inuring to its grant under the act of 1864, but for no particular portion of its road. The lands have been approved at various times as given above in my reply to your 4th inquiry, and the selections were approved by the Secretary of the Interior.

Your seventh question is:

"Were the pre-emption and homestead entries in the Council Bluffs and Sioux City land districts made after June 2d, 1864, and within the limits of said grant, or any of them, allowed under the rulings or construction of the Department or Commissioner, and if so, which of them and on whose authority was the remainder of them allowed?"

A reference to the copies of the orders, correspondence, &c., which I enclose, will give you the information desired. It will show that the homestead and pre-emption entries allowed after June 2d, 1864, were allowed under instructions and orders from this department and office.

The lands were originally withdrawn June 16, 1864, copy of order enclosed marked "A." In a letter from this office, dated June 25th, 1864, copy enclosed marked "B," it was stated that the grant took effect upon all the public lands within the limits of the grant.

Under date of August 22d, 1864, this office recommended to the Secretary of the Interior, that homestead and pre-emption entries be allowed in the Council Bluffs and Des Moines districts, copy enclosed marked "C." The Secretary approved of this view in a letter dated August 24, 1864, copy enclosed marked "D," and an order was accordingly issued August 25th, 1864, copy enclosed marked "E," allowing such entries.

Under date of 2d May, 1865, Hon. A. W. Hubbard addressed a letter to the Secretary of the Interior, requesting that the lands heretofore withdrawn, except the odd numbered sections,

be restored to market and entry, copy of letter enclosed marked "F."

I enclose a copy of a letter from W. T. Steiger, agent of the Cedar Rapids and Mo. River Railroad Company, dated May 12, 1865, marked "G;" a copy of a letter from this office, dated May 26, 1865, marked "H;" a copy of a letter from the Secretary of the Interior, dated May 27, 1865, marked "I;" a copy of a letter from this office, dated May 30, 1865, marked "K;" a copy of a letter from the Secretary, dated June 2d, 1865, marked "L;" also, a copy of the order to the district officers, dated June 7th, 1865, marked "M," forbidding all entries upon railroad lands, both within the original 15 mile limits and the 20 mile limits of the modified line.

Certain lands in the Sioux City and Council Bluffs districts were ordered to be restored to market by the instructions of this office, dated July 6th, 1866, and a list of said lands was furnished to each office. By order dated August 23d, 1866, copy enclosed marked "N;" the local officers were instructed not to allow homestead or pre-emption entries upon the even sections within the 5, 15 and 20 mile limits of the Cedar Rapids and Mo. River Railroad, but to allow such entries upon the lands described in the lists furnished; in such lists were lands outside the 20 mile limits of the modified line, but within the 15 mile limits of the original line. Many entries were allowed upon these lands, and this office has refused to cancel the same where patents have issued. The Railroad Company has appealed from this decision, and said appeal is now pending before the Secretary of the Interior.

I enclose a copy of the order to the local officers, dated September 20, 1866, marked "O," notifying them that no entries should be allowed upon the lands within the 20 mile limits of the roads mentioned in the act of 1864, and that entries made prior to that date (Sept. 20, 1866,) would be canceled. I also enclose a copy of an order, dated Sept. 21, 1866, marked "P." *The Cedar Rapids and Mo. River R. R. Company demand the cancellation of certain entries (among others) made upon lands outside of the 20 mile limits of the modified line, but within the 15 mile limits of the original line. In the view of this office no valid objection can be made to this demand, except where patents have issued. Such cases are considered res adjudicata.*

Your eight question is:

"Were the lands within the limits of said grant, or any of them, withdrawn from homestead and pre-emption after the grant; and if so, which of them, by whose order, and at what times, and for what reasons; and were such lands, or any of them, restored to homestead and pre-emption entry, and if so, which of them, by whose orders, at what times, and for what reasons?"

A reference to the orders, correspondence, &c., given above, will furnish the information desired on these points.

It was supposed that the grant could be satisfied, but on account of

the prior claims of the Des Moines River Improvement Company, which claim was confirmed by the decision of the U. S. Supreme Court, at the December term, 1866, it was found impossible to satisfy the grant for the Cedar Rapids and Mo. River R. R. Company. This supposition may, in part, account for the orders that were issued restoring certain lands to homestead and pre-emption entry.*

Your ninth question is:

"Does the department hold that the said company is entitled to all lands within the limits of the grant which were vacated June 2d, 1864, and if not, what does it hold in this regard?"

This department holds that all the lands in the odd and even numbered sections within the limits of the grant, both within the 20 mile limits of the 'modified line' and the 15 mile limits of the 'original line,' to which no valid adverse rights subsisted June 2d, 1864, inure to the grant for the benefit of the Cedar Rapids and Mo. River Railroad Company. THIS VIEW, IT APPEARS TO ME, IS THE ONLY ONE THAT CAN BE TAKEN, WHEN THE LANGUAGE OF THE SECTION OF THE ACT OF JUNE 2, 1864, IS CAREFULLY CONSIDERED. IT WILL ALSO BE SEEN FROM THE CORRESPONDENCE, THAT SUCH WAS THE VIEW OF THIS OFFICE AT THE DATE OF THE PASSAGE OF THE ACT.

The lands were restored, and entries allowed, many of them in accordance with the orders of this Department, but in view of the fact that the lands had been granted by Congress, and that rights had vested, these orders were erroneous and illegal, and much hardship to settlers is the result; a hardship that this office is powerless to relieve.

It is proper to add in this connection, that by the express terms of the 8th section of the act of June 2d, 1864, the control of the lands granted to aid in the construction of the various lines of roads mentioned in the act, was vested in the Legislature of Iowa, and in case of failure to build the roads or any part thereof, no reversion to the United States is provided for, but the title remains in the State for the purposes of the act. As before stated, the lands which form the subject of this communication are within the limits of the main line of the Cedar Rapids and Mo. River R. R., which has been constructed according to law, and therefore inure to the grant, and must be certified accordingly.

I have endeavored to answer your questions as fully and completely as the records and the information in the possession of this office will admit.

There have been proceedings in the courts of Iowa, and laws enacted by the legislature of that State, affecting the grant, especially east of Cedar Rapids, the terms and purport of which are not fully known to this office. The recent decisions of this office and this department are believed to have been in accordance with the laws of Congress of 1856 and 1864. Very respectfully,

S. S. BURDETT, *Commissioner.*

*Covering 109.756 85-100 acres approved for the road, but lost, and must be added to the defficiency of lands to satisfy the grant.

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It is proper to add in this connection, that by the express terms of the 8th section of the act of June 2d, 1864, the control of the lands granted to aid in the construction of the various lines of roads mentioned in the act, was vested in the Legislature of Iowa, and in case of failure to build the roads or any part thereof, no reversion to the United States is provided for, but the title remains in the State for the purposes of the act. As before stated, the lands which form the subject of this communication are within the limits of the main line of the Cedar Rapids and Mo. River R. R., which has been constructed according to law, and therefore inure to the grant, and must be certified accordingly.

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S. S. BURDETT, *Commissioner.*

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No. VII.

LETTER

FROM

THE COMMISSIONER OF THE GENERAL LAND OFFICE,

RELATIVE TO

The confirmation of pre-emption and homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the Land Department.

February 29, 1876.—Ordered to be printed and re-committed to the Committee on the Public Lands.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., February 14, 1876

SIR: I have the honor to submit the following suggestions upon the bill (H. R. 120, S. No. 34), submitted by reference from your committee on the 27th ultimo, entitled "A bill to confirm pre-emption and homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the Land Department."

The bill seems designed to refer more particularly to grants to States and corporations for railroad and wagon road purposes, although by its language all land grants are included, without restriction, except by designation in the title. These grants have been made at various periods and by particular statutes, and in language or phraseology by no means uniform and unambiguous in its construction; and it necessarily becomes important, in determining what rights have vested in the grantees, to examine the provisions of each particular statute.

The initial act, so to speak, of the present railroad land grant system is that of September 20, 1850, (Stats., 9, p. 466), granting lands to the States of Illinois, Mississippi and Alabama. This act provides, first, that "a copy of the survey of said road and branches, made under the direction of the legislature, shall be forwarded to the proper local land offices, respectively, and to the General Land Office at Washington City, within ninety days after the completion of the same."

Section 2 of the act contains the granting clause, and its provisions are in words of present grant: "That there be, and is hereby, granted," &c., "but in case it shall appear that the United States have, when the line or route of said road and branches is definitely fixed by the authority aforesaid, sold any part of any section hereby granted, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of

said State to select," in the manner provided in the act, indemnity for the said lands so sold or held under pre-emption right.

The act makes no requirement of an executive withdrawal, but vests title at once in the State for the proper quantity of lands, upon the definite location or fixing of the line of road, and allows ninety days after completion of the survey thus fixing the line, for the filing of a copy in the offices of the Government.

Similar to this is the act granting lands to Missouri, June 10, 1852, (Stats., 10, p. 8,) except that the word "location" is used instead of "survey" in the first section, requiring a copy to be made and filed under the direction of the legislature; clearly indicating that the terms "survey" and "location" are identical in meaning and significance.

The act of February 9, 1853, (Stats., 10, p. 155), granting lands to Arkansas, completes the legislation of this particular class.

Next comes the grant to Iowa, of May 15, 1856, (Stats., 11, p. 9,) in like words of present grant, with indemnity for tracts sold, &c., "when the lines or routes of said roads are definitely fixed," but without any direction for ascertaining the manner of determining what shall be deemed a definite location, AND WITHOUT ANY PROVISION REQUIRING EITHER THE FILING OF THE SAME IN THE GOVERNMENT OFFICES, OR AN EXECUTIVE WITHDRAWAL OF LANDS.

Grants in precisely similar terms were made to Florida and Alabama, May 17, 1856, (Stats., 11, p. 15); to Alabama, Louisiana, Wisconsin and Michigan, June 3, 1856, (Stats., 11, pp. 17, 18, 20, 21); to Mississippi, August 11, 1856, (Stats., 11, p. 30); to Minnesota and Alabama, March 3, 1857, (Stats., 11, p. 195); to Kansas, Michigan and Wisconsin, March 3, 1863, (Stats., 12, pp. 772, 797); to Wisconsin, May 5, 1864, (Stats., 13, p. 66); and to Minnesota, May 12, 1864, (Stats., 13, p. 74).

The act of July 1, 1862, (Stats., 12, p. 459), for the Union Pacific and branches, in terms, grants all alternate sections designated by odd numbers, not sold, reserved, &c., "at the time the line of said road is definitely fixed," and makes no indemnity provision whatever. The seventh section requires the filing of a map of general route, and a withdrawal thereon, extending five miles beyond the limits prescribed for the grant to take effect on each side, thus allowing for a possible deviation of ten miles on the definite location from the proposed route, without losing the land thus set apart prior to such location for the satisfaction of the grant. The act of July 2, 1864, (Stats., 13, p. 356), enlarges the grant, but does not materially change its provisions in other respects.

On the main line, from one hundred miles west of Omaha to Salt Lake City, the map of general route was filed, as required by the acts, in June, 1865, yet no withdrawal was made. Not until after the definite location were the lands withheld from settlement, and on a portion of the line not until the road was constructed and in actual operation.

The act of 1864 required the Burlington and Missouri River Railroad Company, preliminarily to a withdrawal, to file a map of its estab-

lished line with the Secretary of the Interior, the grant taking effect, however, when "the line of said road is definitely fixed." (See section 19.)

The Northern Pacific act of July 2, 1864, (Stats., 13, p. 365), grants every alternate section, &c., "at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office." The sixth section, however, excludes from "sale or entry or pre-emption, before or after they are surveyed," all the odd sections for forty miles in width on each side of the general route when fixed; thus making a complete legislative withdrawal long prior to the attachment of the grant by definite location of the road, and without any provision whatever requiring an executive withdrawal.

Of the same nature were the grants to the Placerville and Sacramento Valley Railroad Company, July 13, 1866, (Stats., 14, p. 94), the Atlantic and Pacific and Southern Pacific Companies, July 27, 1866, (Stats., 14, p. 292), and the Stockton and Copperopolis Railroad Company, March 2, 1867, (Stats., 14, p. 548). The first and last of these have been declared forfeited by acts of Congress, and the lands restored to entry.

The grant to Michigan, June 20, 1864, (Stats., 13, p. 140), provides "that when the governor of the State of Michigan shall furnish the Secretary of the Interior with maps and charts showing the definite location of the line of each of said roads, it shall be his duty to have the land granted to each of said roads withheld from market and reserved exclusively for the purposes aforesaid."

This provision, substantially, is found in the following grants, viz; To Minnesota, March 3, 1865, (Stats., 13, p. 526); to Missouri, Arkansas, and Minnesota, July 4, 1866, (Stats., 14, pp. 83, 87); to Kansas, July 23, 25, and 26, 1866, (Stats., 14, pp. 210, 236, 289).

It will be observed that here are no less than five general classes of grants, all couched in words of present grant, all having relation to date of definite location, but differing vitally in their provisions and requirements respecting the filing of maps and the withdrawal of lands.

The first class embraces grants required to be definitely located by legislative authority of the State, and taking effect upon the exercise of that authority, but giving ninety days thereafter in which to file maps of the roads with Government officers, and making no provision for further notice of withdrawal.

The second class, comprising the great body of the land grant laws, covering nearly ten years of active legislation of this character, has no distinctive recital of requirements respecting either the survey of its lines, the filing of maps, or orders of withdrawal; the words being of present grant, taking effect when the lines or routes are definitely fixed.

The third class includes the Union Pacific grants, requiring withdrawals in excess of the quantity granted to be made upon a preliminary map of general route, and taking effect upon definite location—upon

which maps of general route, as before observed, only a portion of the prescribed withdrawals were in fact made, for reasons which at this date I am unable to explain.

The fourth class, embracing the Northern Pacific, Atlantic and Pacific, and Southern Pacific, comprises grants protected by legislative withdrawal within stated limits, from the fixing of the general route, until vested by the filing of the plat of definite location required by the acts.

The fifth class embraces grants couched in terms to take effect upon definite location of the lines, but in which requirement is made for executive withdrawal "as soon as maps showing such location are filed with the Secretary of the Interior."

It is upon this class that the ruling of the Department has been made, holding that the grant takes effect at the date of the adoption of the line by the company, without reference to the provision requiring a withdrawal of lands upon the filing of the map.

There are other and exceptional grants not enumerated in the foregoing, which present individual features so marked as to exclude them from any general classification, some of which should be referred to here; notably the following:

The grant to Minnesota, May 5, 1864, (Stats., 13, p. 64), provides "that when the said road shall be definitely located, and a plat thereof filed with the Secretary of the Interior, the lands hereby granted shall not thereafter be subject to settlement, pre-emption, or private entry, adverse to this grant," thus prescribing a complete legislative withdrawal, to take effect upon the filing of the plat with the Secretary of the Interior.

The act of June 2, 1864, (Stats., 13, p. 96), PROVIDES FOR DEFICIENCIES *in favor of several companies in Iowa, 'out of any public lands now belonging to the United States,' a provision impossible to carry into effect, except by holding the act to operate as a legislative reservation, from its date, of the lands to be appropriated.* (See sections 2, 3 and 4.)

The Texas Pacific Railroad Company is required by act of March 3, 1871, (Stats., 16, p. 573), to file its map of general route within two years, and the Secretary of the Interior is directed to cause a withdrawal of the lands "immediately thereafter," the grant, like all the others, taking effect "at the time the line of said road is definitely fixed."

It is necessarily true that large numbers of entries must have been allowed upon lands within the limits of these grants before advice of the definite location and proper diagrams of limits could be placed on file in the district offices; although it was for a long period customary to withdraw large bodies of lands in the vicinity of proposed routes, and hold them out of market for months, and even years, to await the location of the lines. All the lands in a State have been thus withdrawn at various periods.

It is also true that, although the rule was at the first strictly laid down and promulgated, holding that the right to these grants attached

at once upon the definite location of the roads, this rule was gradually departed from and practically ignored by one or more of the former Commissioners of this Office, and it became the usual practice to direct that orders of withdrawal should take effect from the date of receipt at the district offices. I do not find, from the records, that the legality of this practice has been sustained by the decisions of the Secretaries of the Interior on appeal; but it has, to an extent, at various times, been so far acquiesced in as to give it the force and effect of custom.

These recitals will sufficiently indicate the application of the first provision of the bill.

Respecting the second, I have to report that no instance has come to my notice, in the records of the department, in which lands once granted have been restored to market after the expiration of the time prescribed for the construction of any road, unless Congress has first declared a forfeiture and directed such restoration. Some instances are of record where lands supposed to be no longer needed for the purposes of an adjustment of a grant have been prematurely and improvidently restored, under circumstances that compelled their subsequent withdrawal, the grants to which they pertain not having been satisfied. This mistaken action has operated to deceive and mislead settlers who have entered in good faith upon the lands, supposing title could be obtained; and disappointment has, of course, resulted from the attempt to correct these errors, and to deliver the proper evidences of title to the parties having legal priority of right in the lands.

One or two instances have also occurred where the Department has refused to recognize a location upon which lands have already been withdrawn; the reason for such refusal being based upon an opinion that the calls of the granting act had not been followed in establishing the line through the localities designated by the law, but which location has, upon further consideration, been approved by the Secretary of the Interior, and the order of withdrawal has been renewed.

The companies insist that their right to fix their own location is perfect, under the law, without reference to the approval of the department, and that, if the location is such as the statute has authorized, they are entitled to their lands from the date of such location, although, upon the contrary assumption, they have been thrown open to entry and taken up by settlers pending the consideration of the question by the department.

These suggestion will indicate the facts respecting the application of the second provision of the first section of the bill; and also of the entire third section, which will be seen to have no bearing upon any class of entries permitted by the department.

Of the second section, I have only to say that I find nothing in the records of this office requiring special mention as coming in any manner within its application. Very respectfully,

L. K. LIPPINCOTT,
Acting Commissioner.

Hon. MILTON SAYLER,
Chairman Committee on the Public Lands,
House of Representatives.

No. VIII.

AN ACT providing for and requiring the early construction of the Chicago, Rock Island and Pacific Railroad, from Davenport to Council Bluffs, Iowa, upon certain conditions therein named.

"WHEREAS, The State of Iowa, by an act passed and approved on the 14th day of July, A. D. 1856, granted to the Mississippi and Missouri Railroad Company (a corporation then in existence under the laws of this state) certain lands, in said act designated, to aid in the building of a railroad from Davenport to Council Bluffs; and,

"WHEREAS, Subsequently, to wit: on the 26th day of May, A. D. 1866, another corporation was formed, called the Chicago, Rock Island and Pacific Railroad Company, in Iowa, to purchase (in part) and build a railroad between the same points and along, the or near the line of the said Mississippi and Missouri Railroad; and,

"WHEREAS, The said Mississippi and Missouri Railroad Company became insolvent, and the said Chicago, Rock Island and Pacific Railroad Company became the purchaser, at a judicial sale, of all the right of the said Mississippi and Missouri Railroad Company; and,

"WHEREAS, The said Chicago, Rock Island and Pacific Railroad corporation subsequently, to wit: on the 20th day of August, A. D. 1866, consolidated its stock and corporate rights with that of the Chicago and Rock Island Railroad Company, a corporation existing by virtue of the laws of the State of Illinois, with a stipulation and agreement between the said consolidated companies that the whole line would adopt the corporate name of the Chicago, Rock Island and Pacific Railroad Company; and,

"WHEREAS, The said consolidated company has completed the said line of road as far as the city of Des Moines, and desire to complete the same to the Missouri River as rapidly as possible, and for this purpose desire the use of said lands so granted to aid in the completion of the same: *Therefore*,

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa:* That the consolidation of the Chicago and Rock Island Railroad Company, a corporation created by the laws of the State of Illinois, with The Chicago, Rock Island and Pacific Railroad Company, of this State, under the name of the last named corporation, be and the same is hereby recognized for the purposes named in their articles of consolidation as recorded in this State.

"SEC. 2. The said consolidated company is hereby required to construct, complete and operate its railroad from the city of Des Moines to a point at or near Council Bluffs, on the Missouri river, as required by the article of incorporation of the said Chicago, Rock Island and Pacific Railroad Company, in this State, so as to enable it to connect its line of road with the Union Pacific Railroad at as early a period as practicable, and within two years from the passage of this act, and to apply the lands heretofore granted by the General Assembly to the Mississippi and Missouri Railroad Company to the building

and completion of said line of railroad, for which purpose the State of Iowa hereby grants unto the said consolidated railroad company all right or interest the State may have in said land: *Provided* said railroad company accepting the provisions of this act shall at all times be subject to such rules and regulations and rates of tariff for tranportation, freight and passengers as may, from time to time, be enacted and provided for by the General Assembly of the State of Iowa, and further subject to the conditions, limitations, restrictions and provisions contained in this act, and the acts of Congress granting the same to the State, and extending the time for the completion of said road: *Provided*, said consolidated railroad company shall also apply to such construction, completion and equipment thereof, all the proceeds of forty-nine thousand shares of said capital stock, issued and sold by said consolidated company, or for it, by or under the direction of its executive committee, or the agents thereof, since the 13th day of September last, or so much thereof as may be necessary for that purpose; and the issuing and sale of said shares of the capital stock of said consolidated company as full-paid shares, and sale of the same for less than the sum of one hundred dollars per share, by its officers, are hereby confirmed and declared valid, and the same are and shall be deemed and taken to be full-paid shares of said consolidated company, issued and sold for the purpose of completing said line of road from Des Moines to Council Bluffs, and not liable to any calls or assessments; *And provided further*, that the board of directors of said consolidated company shall postpone the annual meeting of the stockholders for the election of directors thereof, until the first Wednesday of June, A. D. 1869, and that said board of directors shall make and file with the Secretary of this State, on or before the first days of July and January, until said road is completed, a report in writing verified by the President or Engineer, showing the progress of the work, the portions of the road finished, how much under contract, and the amount expended thereon: *And provided further*, the said consolidated railroad company shall signify their acceptance of the provisions of this act by filing in the office of the Secretary of State, of this State, a written acceptance thereof, by the President and Secretary of said Company, within ninety days from the passage of this act.

"SEC. 3. In case said consolidated company shall neglect to comply with any of the requirements of this act, it shall forfeit to the State all its franchises and corporate rights acquired by or under the laws of this State; and all lands in such case which have been granted to aid in the construction of said road, or any part thereof, by this State or the United States, held by said consolidated company, or by any person or persons by, through or under them, shall be forfeited, and shall revert to this State, any conveyance or incumbrance by said company to the contrary notwithstanding.

"SEC. 4. Any person who, at the date of the filing in the proper department at Washington of the maps showing the location of the route or line of the Mississippi and Missouri Railroad, in compliance

with the requirements of section six, chapter one, of the acts of the extra session of the Fifth General Assembly, was in the actual occupation, and had made improvements on any of said lands, and has remained in the continuous occupation of the same to the date of the taking effect of this act, and the grantees of any person having such occupancy with improvements, when such grantee and his grantor have been in such continuous occupation, shall have the right to purchase one hundred and sixty acres of the land thus occupied and improved upon the terms and conditions hereinafter provided.

"SEC. 5. Any person wishing to avail himself of the preceding section, shall, within four months from the taking effect of this act, file his application for such purchase in the county court of the county in which such lands may be situated, with other proofs, in writing, showing his right to make such purchase under the provisions of the preceding section, and showing that he has never, directly or indirectly, received any of the benefits secured to actual settlers on any lands embraced in said grant, either by this act or by the provisions of sections ten, eleven, and twelve of an act in the preceding section mentioned, a copy of which application and proofs shall be personally served upon the secretary of said company, If such proofs shall establish the right of the applicant to make such purchase, and that he has not, either directly or indirectly, purchased any other lands embraced in said grant, under the provisions of this act or of the act above mentioned, the court shall give him a certificate setting forth such facts, a copy of which shall be personally served upon the secretary of said company. The applicant shall, within ninety days after the execution of such certificate, pay to the Treasurer of State, for the use of said company, one dollar and twenty-five cents per acre for the lands described in the certificate, for which the Treasurer shall execute duplicate receipts, one of which shall be endorsed on said certificate, and the other shall be delivered to the secretary of said company. Either party shall have the right to appeal from the decision of the county court to the district court, in the same manner as appeals are taken from the judgments of justices of the peace, within ninety days after the decision of the county court; and the same shall be tried in the district court as a cause triable by the first method of trying equity causes, the applicant being the plaintiff and the company the defendant; and the court, in its final decree, shall make such order touching the title and the disposition of the moneys deposited with the State Treasurer as the law and the facts require. When no appeal is taken in the time above described, the title shall vest in the applicant, and the moneys so paid to the Treasurer of State shall be held by him and paid to said company, when it shall have been vested with a complete title to said lands under this act.

"SEC. 6. That nothing contained in this act shall be so construed as to affect any rights heretofore acquired by third parties to any lands claimed under said grant; and the provisions of an act of the General Assembly of Iowa, entitled 'An act to quiet the title to certain lands sold by the State of Iowa, to individuals, as part of the Des

Moines River Grant,' approved April 2, 1866, are hereby ratified and confirmed: *Provided*, that said consolidated railroad company shall relinquish to the county of Pottawattamie all right or claim which it now has or may hereafter acquire to any bonds or agreements to take stock or indebtedness heretofore voted by the county of Pottawattamie to or in aid of the construction of the Mississippi and Missouri Railroad, so far as said consolidated railroad company is concerned, all acts, votes, decrees or agreements, on the part of Pottawattamie county to issue bonds to the Mississippi and Missouri Railroad Company, are hereby declared null and void.

"SEC. 7. This act being deemed by the General Assembly of immediate importance, shall take effect and be in force from and after its publication in the *Daily State Register*, and the *Iowa Evening Statesman*, newspapers published at Des Moines, Iowa.

"APPROVED, February 11, 1868."

No. IX.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,
WASHINGTON, D. C., June 27th, 1874.

Register and Receiver, Des Moines, Iowa.

GENTLEMEN: I have considered your communication of 4th December last, forwarding rejected homestead applications, twenty-three in number, as follows:

Theodore B. Burr,	S. W. ¼	11, 81, 39.
Horace S. Burr,	N. E. ¼	11, 81, 39.
Ralph E. Burr,	S. E. ¼	11, 81, 39.
Wm. J. Blair,	S. W. ¼	3, 81, 37.
Wm. C. Blair,	S. E. ¼	3, 81, 37.
Wm. S. Blake,	N. E. ¼	29, 81, 37.
Samuel R. Bufkin,	N. E. ¼	9, 81, 37.
George E. Bennet,	N. W. ¼	33, 82, 37.
Andrew L. Bell,	S. ½ N. ¼,	
and N. ½	S. W. ¼	15, 81, 37.
John Crane,	S. E. ¼	31, 81, 38.
Desire F. Chausse,	S. W. ¼	21, 81, 37.
George Darling,	N. E. ¼	21, 81, 37.
Albert W. Darling,	S. E. ¼	21, 81, 37.
Garland Edwards,	N. W. ¼	1, 80, 38.
George W. Grinnell,	S. E. ¼	9, 81, 37.
Paleman Goodman,	W. ½ S. E. ¼,	
and S. ½	S. W. ¼	15, 81, 37.
Samuel A. Hale,	S. E. ¼	27, 81, 37.
Benj. H. Lathrop,	N. E. ¼	3, 81, 37.
C. H. Ketcham,	N. W. ¼	21, 81, 37.

Winfield S. Pixley, N. E. ¼ 25, 81, 38.
Wm. H. Townson, N. ½ S. E. ¼,
and N. ½ S. W. ¼ 29, 81, 37.
Andrew H. Willfong, N. W. ¼ 3, 81, 37.
Thomas S. Whitehouse, W. ½ N. E. ¼,
and N. ½ N. W. ¼ 15, 81, 37,

You rejected these applications for the reason that the tracts were approved December 27th, 1858, to the State of Iowa, for the construction of the Mississippi and Missouri Railroad.

The lands are situated more than twenty miles from the line of construction, as located under the act of June 2d 1864, authorizing a change of route. The act of January 31st, 1873, confirmed to the companies named in the statute the title to the lands thus certified, with a proviso excluding all lands settled upon in good faith, and then occupied by homestead or pre-emption settlers.

The parties above named do not present their claims under the provisions of this act, but apply in the usual form, without setting forth any facts that can give them a status before the department. Their attorney, however, in his argument, insists that they are all protected by the act. If so, they must bring their applications upon the proper grounds, and set forth the facts, with full notice to the railroad companies, and proceed by regular hearings to establish their claims before you, which hearings you are authorized to appoint for that purpose, if the claimants shall so desire.

Your action in rejecting the applications, as presented, is approved.

Of the foregoing tracts the S. ½, N. W. ¼, 21, 81, 37, embraced in the claim of Ketcham, and the N. W. ¼ of S. W. ¼, 29, 81, 37, claimed by Towson, have been claimed as swamps, and must be examined as required by the act of March 5th, 1872. Respecting these tracts the swamp claim must be included in the hearing, should the parties proceed, and notice to the proper authorities will be required, as in other cases.

Proceed regularly in any investigation entered upon by parties under these instructions, and make separate reports upon each case, according to the proofs laid before you.

Very respectfully,
S. S. BURDETT, *Commissioner.*

No. X.

Notice.

Des Moines, Iowa, August 12th, 1874.

Applications have been made at this office to enter under homestead act of May 20th, 1862, the following described lands, viz:

N. ½ S. W. ¼ and S. ½ N. W. ¼, Sec. 15, 81, 37, *by A. L. Bell.*
N. E. ¼ Sec. 21, 81, 37, *by George Darling*

N. E. ¼ Sec. 3, 81, 37, by *B. H. Lathrop.*

S. ½ N. W. ¼ and N. ½ S. W. ¼, Sec. 25, 81, 39, by *Ebenezer Treffy.*

N. E. ¼, N.W. ¼ and N. ½ N. E. ¼, Sec. 4, and N. ½ N.W. ¼ Sec. 3, 81, 38, *by Charles Brown*, the parties claiming that their rights are protected by the provisions of the act of January 31st, 1873, entitled, "an act to quiet title to certain lands in the State of Iowa," they alleging settlement and occupation of said lands prior to the date of the passage of the act last above named; therefore, by direction of the Commissioner of the General Land Office, a hearing is hereby ordered to be held at this office, on the 23d day of September, 1874, at 9 o'clock A. M., at which time all parties interested are hereby summoned to appear and submit testimony in regard to the settlement, improvement and cultivation of the several tracts above named by the parties applying to enter the same.

F. G. CLARKE, *Register.*
G. L. GODFREY, *Receiver.*

No. XI.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,
WASHINGTON, D. C., April 5th, 1875.

Register and Receiver, Des Moines, Iowa.

GENTLEMEN: I have considered the case of *Andrew L. Bell* v. *The Chicago, Rock Island and Pacific Railroad Company*, involving title to the N. ½ of S. W. ¼ and S. ½ N. W. ¼, Sec. 15, Tp. 81 N., R. 37 W.

This tract is within the fifteen mile limits of the grant for the Mississippi and Missouri (now Chicago, Rock Island and Pacific) Railroad Company, made by act of Congress, approved May 15, 1856, but is outside the twenty mile limits of the modified line authorized by the Act of June 2d, 1864.

It was certified to the State of Iowa for railroad purposes December 27th, 1858.

The land was withdrawn from settlement and entry in 1856, and has not been restored by order of this Department.

From the evidence, it appears that Mr. Bell entered upon the land in November, 1872. He has made valuable improvements. and appears to have acted in good faith; as the impression seems to have prevailed in that part of the State that this land was subject to homestead and pre-emption entry.

He alleges that he is protected in his claim to the tract by the Act of January 31, 1873.

By the act of Congress, approved May 15, 1856, there was granted to the Siate of Iowa, every alternate section designated by odd num-

bers, for six sections in width, on each side of the road. The act expressly declares, that, if, when the line or route of said road is *definitely fixed* it shall appear that the United States have sold or reserved any lands granted in place, indemnity sections shall be allowed with a proviso that the lands selected shall in no case be farther than 15 miles from the road.

Under the rulings of the Department, the establishment of the definite location of the road, is the date at which the lands within the limits inure to the grant.

Something further on the part of a railroad company than a mere definite location of a road, is, however, required, in order to vest in the corporation title to the lands granted.

The road must be constructed on the line as definitely located, unless by some act the granting power release the company from its obligation in that regard.

The road in question was definitely located under the Act of 1856, prior to March 2d, 1857, and had the road been constructed on that line, no question of title to the land would have arisen.

The Legislature of the State of Iowa, by act approved July 14, 1856, conferred the lands granted by the act of May 15, 1856, upon the Mississippi and Missouri Railroad Company.

By act of Congress approved June 2d, 1864, this company was authorized to change or modify the line of uncompleted road.

The 2nd section of the act provides, that when such *new* location shall have been established, the company shall file in the General Land Office, a map, showing such new location, and the Secretary of the Interior is authorized to cause to be certified and conveyed to said company, from time to time, as the road progresses, out of any public lands of the United States, not sold or otherwise reserved, within six miles of such *newly* located line, an amouut of land per mile, equal to that originally authorized to be granted to aid in the construction of said road, by the act of 1856.

And if the amount of land granted by the original act, to aid in the construction of said railroad shall not be found within the limits of six miles from such line, then such selection may be made along such line within twenty miles thereof.

It seems clear, from the wording of this section, that the company, under the act, could not legally claim any land outside of the twenty mile limits of the modified line.

By the 4th section of the act of 1864, the Cedar Rapids and Missouri River Railroad Company is required to take the lands in the original limits, with the privilege of making up deficiencies only upon the line of the modified route. The grant is expressly confined to the limits of the line as *originally located.*

Had Congress intended to re-grant the lands within the limits of the original line of the Mississippi and Missouri Railroad, it is reasonable to presume that it would have expressed that intention in like definite terms; instead of which, all the limitations in the act are expressly marked with reference to the new, or modified line.

The attention of this office is especially directed by the counsel for the company, to a porviso of the 4th section of the act of June 2d, 1864, as follows:

"That nothing in this act shall be construed to interfere with, or in any manner impair, any rights acquired by any railroad company named in the act to which this is an amendment, or the rights of any corporation, person or persons, acquired through any such company, —nor shall it be construed to impair any vested right of property, but such rights are hereby reserved and confirmed."

To properly decide the issue presented, it becomes necessary to inquire whether the Mississippi and Missouri Railroad Campany acquired any right to the tract in question under the act of May 15, 1856.

By reference to the 4th section of said act, it is ascertained that the manner of disposal of the lands granted, was prescribed as follows:

"That a quantity of land, not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the Governor of said State snall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be sold, and so from time to time until said roads are completed."

The Mississippi and Missouri Railroad was not completed, opposite the tract in question, in December, 1858, and never was completed on the line as originally located.

The certification by the Secretary of the Interior, of the tract in question, as land inuring to the State of Iowa under the grant for railroad purposes, cannot be considered as conveying the title, or vesting any right in the company.

The act of 1864 was then passed, making the changed conditions under which the grant must now be considered.

The 8th section of this act provides as follows:

"That no lands hereby granted shall be certified to either of said companies, until the Governor of the State of Iowa shall certify to the Secretary of the Interior that the said company has completed, ready for the rolling stock, within one year from the first day of July next, a section of not less than twenty miles from the present terminus of the completed portion of said railroad, and in each year thereafter an additional section of twenty miles; but the number of sections per mile originally authorized shall be certified to each company, upon proof, as aforesaid, of the completion of the additional sections of the road, as aforesaid, and upon the failure of either company to complete either section as aforesaid, to be annually built, the portion of the land remaining uncertified shall become subject to the control and disposition of the Legislature of the State of Iowa, to aid in the completion of such road.'

The company wholly failed to comply with this condition, and the land granted became subject to the control of the Legis-

lature of the State of Iowa; and such control was duly exercised by the Legislature through a judicial proceeding in the courts of the State.

The Chicago, Rock Island and Pacific Railroad Company became, by purchase under the decree, the successor to all the rights and privileges of the Mississippi and Missouri Railroad Company, and the Legislature of Iowa, by act approved February 11th, 1868, conferred upon said company the grant made to aid in the construction of the road. The company was required to complete and operate the road from the city of Des Moines to a point at or near Council Bluffs, and was to be subject to all the conditions contained in the acts making the grant of lands, and among these conditions was the important one, that the lands were to be selected within twenty miles of the road, The change of line was a voluntary act on the part of the company, and operated as an acceptance of the conditions of the grant.

On the 11th of January, 1870, the company filed in this office a map of road as constructed from Davenport to Council Bluffs under the acts of 1856 and 1864, and the lands pertaining to the entire line have been claimed and certified in accordance with this map.

The enquiry now arises, in what condition was the tract in question prior to January 31, 1873, it being outside the twenty mile limits of the road as located and constructed under the act of 1864, but within the fifteen mile limits of the line as originally located under the act of 1856, and certified to the State of Iowa for railroad purposes December 27, 1858?

It is considered that by the definite location of the road, the title vested in the State by the act of 1856 attached to these lands, liable, however, to reversion, at the pleasure of Congress, in case of failure to build the road. The certificate of 1858 was simply the customary evidence of the title, as it stood in the State, for the purposes of the grant—a mere identification of the lands embraced in the prescribed limits. The State corporations, being unable to fulfil the conditions of the act, applied to Congress for further legislation, which application resulted in the act of 1864, heretofore recited, providing for a new location, at the pleasure of the various companies, extending the time for completion, releasing the reversionary interest of the Government, and making new grants, governed by new conditions and limitations, expressly defined. In accordance with the terms of this act, the new line was located, and the title to the lands within the twenty mile limits vested in the grantees. The grant of 1864 was a substitution for that of 1856, and the title to the lands granted by the original act outside of the twenty mile limits of the new location, passed to the United States, not by means of a declared forfeiture, but by substitution. The act of June 2d, 1864, related to several companies and roads in the State of Iowa, and the 6th section of said act tends to confirm the views heretofore expressed. Said section is as follows:

"That the Dubuque and Sioux City Railroad Company may so far change

their line—between Fort Dodge and Sioux City—as to secure the best route between those points; said change shall not impair the rights to, *nor change the location of*, their present land grant."

By implication it would seem to follow, that, unless the location of a grant is expressly defined, it must be determined by the line of the road —as definitely and finally fixed.

By the act of January 31, 1873, Congress confirmed to the Chicago, Rock Island and Pacific Railroad Company the lands theretofore certified and approved to the State of Iowa. By a proviso to this act, "All lands settled upon in good faith," and "occupied by homestead or pre-emption settlers," were excluded from its operation. In the construction and interpretation of this statute, it is considered that the words "homestead and pre-emption settlers," are used in a descriptive, and not in a technical sense. The lands were withdrawn in 1856, and not restored; hence, technically speaking, there could be no homestead, or pre-emption settlers upon them. The words are used to designate persons who had settled and were residing upon these lands in good faith, and who, had the lands been restored, would have been competent to make entry under those laws. This view is confirmed by the fact, that at the time these lands were certified to the State, there could have been no settlers under the homestead law, as said statute was not passed until years afterward. The use of the term "homestead settler" by Congress in this connection, would be meaningless upon a technical construction, confining it to one who has made actual entry under the homestead law; as it could not possibly have any application to the lands mentioned in the proviso. It should not be presumed that Congress inserted words without meaning or purpose, in the controlling limitation of a confirmatory statute.

Congress had absolute control over these lands, and it is considered that by this proviso it is intended to protect such settlers, and that their entries were to be allowed. The act itself is to be considered as an actual recognition of the right of entry by the parties designated, without further legislation. It is a liberal act, for the protection of actual settlers, and should be beneficially construed for that purpose.

It is therefore decided, that the application of Mr. Bell, to enter the land described, should be allowed.

You will notify the parties in interest, and allow sixty days for appeal.

Very respectfully,

[Signed] S. S. BURDETT, *Commissioner.*

No. XII.

DEPARTMENT OF THE INTERIOR,
Washington, August 31st, 1876.

SIR: I have considered the case of *Andrew L. Bell* v. *The Chicago, Rock Island and Pacific R. R. Co.*, involving the title to the N. ½ of the S. W. ¼ and the S. ½ of the N. W. ¼ of Section 15, T, 81 N., R. 37 W., Des Moines District, Iowa, on appeal from your decision of April 5th, 1875.

The tracts in question are within the fifteen miles limits of the original route of the Mississippi and Missouri (now Chicago, Rock Island and Pacific) R. R. Co., as established under the grant to the State of Iowa, made by an act of Congress. approved May 15th, 1856, and outside of the tweuty mile limits of the modified route of said road, authorized by the act of June 2d, 1864. They were withdrawn from settlement in 1856, and have not since been restored by order of this Department.

Mr. Bell has made valuable improvements on said lands, and resided thereon since Dec. 20, 1872, claiming the right to enter thc same as a homestead, but with notice that they were claimed by the above named railroad company, under the grants aforesaid.

On the 23d of September, 1874, he filed with the local officers an application to enter said land as a homestead, alleging that his right, so to do do, was protected by the act of January 31st, 1873. This application was refused by the local officers, on the ground that said lands were certified to the State of Iowa, to aid in the construction of the Mississippi and Missouri R. R., and that said certification has never been reversed.

The act of January 31st, 1873, reads as follows:

"That the title to the lands in the State of Iowa, heretofore approved "and certified by the Department of the Interior, for railroad purposes, to aid "in the construction of a railroad from the city of Davenport, *via* Iowa City, "to Council Bluffs, under the grants made by Congress, according to the ad- "justments thereof made at the Generai Land Office, be, and the same is "hereby confirmed to the Mississippi and Missouri Railroad Company, and "the Chicago, Rock Island and Pacific Railroad Company. and their assigns, "they being the corporations to whom said lands were certified: *provided*, that "this act shall be construed as conveying only any reversionary or other in- "terest, which the United States may have in said lands, and all lands settled "upon in good faith, and now occupied by homestead or pre-emption settlers, "shall be excluded from the operation of this act."

The only question presented in this case is, whether the title to the tracts in question, was in the United States at the date of the passage of said act, subject to the disposal of Congress.

You held that it was, and directed that Mr. Bell be permitted to enter the same as a homestead. From your decision, the above named railroad company took an appeal, alleging that the title to said tracts, vested in it, at the date of the passage of said act, and that its rights thereto were not affected thereby.

In order to determine the question thus presented, an examination of the several acts of Congress, and of the Legislature of the State of Iowa, from which said company claims title to said tracts, is made necessary.

By the act of Congress, approved May 15th, 1856, there was granted to the State of Iowa, to aid in the construction of certain lines of railroads therein mentioned, "every alternate section of land, designated by odd numbers, for six sections in width, on each side of said road." It was further provided, in said act, that if, at the time the lines or routes of said road were definitely fixed, the United States had sold any of the land so granted, or if the rights of pre-emption had attached to the same, other lands should be selected in lieu thereof, by agents appointed by the Governor of said State, subject to the approval of the Secretary of the Interior.

This grant the State of Iowa, by an act of her General Assembly, approved July 14th, 1856, accepted on the terms and conditions therein specified, and the same act granted said lands to the several railroads therein mentioned, upon the conditions and limitations therein named.

The line of route of the Mississippi and Missouri Railroad, one of the grantees of the State, was definitely located prior to March 3d, 1857, and upon the application of an agent of the State of Iowa, appointed by the Governor of said State, the lands in question, with other lands, were, on December 27th, 1857, duly certified to the State for the benefit of said company.

Did said company, by virtue of the acts aforesaid, and the definite location of its route, acquire any title to the lands so certified?

This question I think is fully answered by the Supreme Court in the case of the *Railroad Land Company* v. *Courtright*, (21st Wallace, page 316,) where the Court says:

"The act of Congress of May 15th 1856, was a grant *in presenti*; it passed a title to the odd sections designated, to be afterwards located. When the line of the road was fixed, and the location of the odd sections thus became certain, the title of the State acquired precision, and at once attached to the land, and the act of the State, July 14th, 1856 was also a grant *in presenti* to the first railroad company. That company took the title and interest of the State, upon the terms, conditions and restrictions expressed in the act of Congress. The further conditions as to the completion of the road imposed by the State were conditions subsequent, and not condtions precedent, as construed by the defendant."

The title which the company thus acquired was defeasible but it was a title nevertheless which the company could only be divested of by a forfeiture declared for a breach of the conditions of the grant, or by a conveyance in accordance with law.

It is claimed that by the act of Congress, approved June 2d, 1864, and the action of the company thereunder, the title of the company to the lands in question was lost and other lands were taken in lieu thereof. By that act the company was authorized to change or modify the line of its uncompleted road. The act also provides:

"That whenever such new location shall have been established, the company shall file in the General Land Office at Washington, a map definitely showing such new location, and the Secretary of the Interior shall cause to be certified and conveyed to said company from time to time, as the road progresses, out of any public lands now belonging to the United States, an amount of land per mile equal to that originally authorized to be granted to aid in the construction of said road by the act to which this is an amendment; and if the amount of land granted by the original act to aid in the construction of said railroad shall not be found within the limit of six miles from such line, then such selections may be made along such line within twenty miles thereof."

The line of the road was changed, a map of the new route was filed in your office, and the lands pretaining to the entire line have been claimed and certified in accordance with said map.

You held that:

"The grant of 1864 was a substitution for that of 1856, and the title to the lands granted by the original act, outside of the twenty-mile limits of the new location, passed to the United States, not by means of a declared frofeiture, but by substitution."

In this I think you erred. In the first section of said act the fact that the State of Iowa had granted to the Mississippi and Missouri Railroad Company, to aid in the construction of a railroad from Davenport to Council Bluffs in said State, a portion of the lands granted to her by the act of May 15th, 1856, is recognized, and in the 4th section of said act it is expressly provided:

"That nothing in this act shall be construed to interfere with or in any manner impair any rights aquired by any railroad company named in the act to which this is an amendment, or the rights of any corporation, person or persons, acquired through any such company; nor shall it be construed to impair any vested right of property; but such rights are hereby reserved and confirmed."

By thus recognizing the right of said company to the lands granted to it by the State of Iowa, and confirming any rights which it had acquired under the act of 1856, and also by confirming the rights of any corporation, person or persons, acquired through said company, I think it is quite clear that Congress did not intend to substitute other hands for it or any portion of it.

If there had been any irregularities in the selection and certification of these lands to the State, and the granting of them by the State to the company, these were waived, and all prior acts were treated as valid.

The grant of 1856 was to the State of Iowa, and the title to the lands granted could revert to the United States only by a forfeiture declared for a breach of the conditions named in the grant, or a release by the State or her grantee of the same to the Government; neither has been done, and the title therefore remains in the State or her grantee.

The Mississippi and Missouri R. R. Co. failed to comply with the

conditions of the grant to it by the State, and the lands granted thereby became subject "to the control of the legislature of the State of Iowa;" and such control was duly exercised by the legislature through a judicial proceeding in the courts of that State. The Chicago, Rock Island and Pacific R. R. Co. became, by purchase, under the decree, the successor to all the rights and privileges of the Mississippi and Missouri R. R. Co., and the legislature of Iowa, by act approved February 11th, 1868, conferred upon said company the grant made to aid in the construction of said road.

The act of January 31st, 1873, confirmed to the Mississippi and Missouri, and the Chicago, Rock Island and Pacific R. R. Co., and their assigns. "any reversionary or other interests" which the United States had in the lands theretofore granted to aid in the construction of a railroad from the city of Davenport *via.* Iowa City to Council Bluffs, in the State of Iowa, but as the United States, at that time, had no title or interest in the lands granted to said State by the act of 1856, subject to her disposal, the proviso in said act that "all lands settled upon in good faith, and now occupied by homestead or pre-emption settlers, shall be excluded from operations of this act," as to said lands, was without force, and gave to such settlers no rights.

I therefore reverse your decision, and affirm that of the local officers. The papers transmitted with your letter "F" of May 31st, 1875, are herewith returned.

Very respectfully.

[Signed] Z. CHANDLER.

TO THE COMMISSIONER OF THE
GENERAL LAND OFFICE

No. XIII.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., May 4, 1880.

SIR: I have considered the case of *Charles Brown* v. *The Chicago, Rock Island and Pacific Railroad Company*, successors to the Mississippi and Missouri Railroad Company, involving the N. E. ¼ N. W. ¼ and N. ½ of N. E. ¼ Section 4, and N. W. ¼ of N. W. ¼ Section 3, Township 81 N., Range 38 W., and also the case of George Darling vs. same company, involving the N. E. ¼ Section 21, Township 81 N., Range 37 W., Des Moines, Iowa, on appeal from your decision of July 24th, 1877, adverse to Brown and Darling.

The facts of this case are as follows, viz: The tracts in dispute are within the original fifteen mile limits of the grant to the Mississippi and Missouri Railroad Company (now Chicago, Rock Island and Pacific R. R. Co.), as established under the act of Congress approved May 15th, 1856, (11 Stat., p. 9,) and outside of the twenty mile limits of the modified line of said road, as established under authority of the act of Congress approved June 2, 1864. (13 Stat., p. 95.)

The N. W. ¼ of N. W. ¼, Section 3, Township 81 N., Range 38 W., and the N. E. ¼ Section 21, Township 81 N., Range 37 W., were certified to the State of Iowa for the benefit of said company on December 27, 1858, and the N. E. ¼ of N. W. ¼ and N. ½ N. E. ¼ were certified on June 25th, 1870.

On November 10th, 1874, Brown made application to enter the land claimed by him under the homestead laws, alleging his right to make such entry was protected by an act of Congress, approved January 31, 1873, entitled "An act to quiet the title to certain lands in the State of Iowa." (17 Statute, p. 421.)

Darling made application on same date to make homestead entry for the land claimed by him, alleging that his right to do so was also protected by the act above cited. Brown settled on said lands on March 12, 1871, and Darling settled on November 8th, 1872.

Both parties have made valuable improvements on the tracts claimed by them, and have resided thereon continuously since the date of settlement.

The proviso to the confirmatory act of January 31st, 1873, which is relied upon by these settlers is in the following words:

"*Provided*, That this act shall be construed as conveying only any reversionary or other interest which the United States may have in said lands, and all lands settled upon in good faith and now occupied by homestead or pre-emption settlers, shall be excluded from the operation of this act." (17 Stat., *supra*.)

You decided that the United States had no title or interest in the lands in dispute at the date of said act, and that said proviso was therefore without force, and gave said applicants no right to enter the same, basing your opinion upon the decision of my immediate predecessor—Hon. Z. Chandler—dated August 31, 1876, in the case of *Andrew L. Bell* vs. *The Chicago, Rock Island and Pacific Railroad Company*. (Copps' Land Owner, January, 1877, p. 166.)

The claimants have appealed from your decision and assigned numerous grounds of error therein.

As before stated, these lands were thrown outside the 20 mile limits of said road by modification of the route thereof under the act of June 2, 1864, and the underlying question presented on the merits of this case is, whether the grant of 1864 was a substitution for that of 1856, or whether it was an enlargement thereof. My predecessor decided, in the case above mentioned, that the grant of 1864 was an enlargement of the grant of 1856, and did not interfere with, or in any manner impair the right of the company to the lands which were thrown outside 20 miles limit of the route of said road by the modification of the line thereof.

It was also decided that the title to the lands granted to the State could revert to the United States only by a forfeiture declared for breach of the conditions named in the grant, or a release by the State or Iowa or her grantees of the same to the Government, and as neither had been done, the title remains in the State or her grantee.

It was also held that inasmuch as the United States had no title or interest in said lands at the date of the act of January 31st, 1873, the proviso to said act was without force, and gave the settlers no right to enter the land in contest.

The title of this company to the lands outside of the 20 mile limits, was also the subject of consideration by the United States Court for the 8th Circuit, which embraces the State of Iowa, and after alluding to the grants of 1856 and 1864, and reciting the facts of the case, the Court (DILLON, J., presiding), decided as follows:

"Upon this statement of facts there can surely be no doubt that the plaintiff (the grantee of the company), is entitled to judgment. The title to the tract of land in controversy in this suit was, by the act of 1856, vested in the State of Iowa. The tract in question was within the terms of the act of 1856, and when it was selected, and the selection approved and certified by the commissioner of the General Land Office, the title became perfect in the State. Every act had been performed necessary to make the title of the State complete." (*Drury* v. *Hollenbeck*.)

After a careful examination of the granting acts of 1856 and 1864, as well as the conformatory act of January 31st, 1873, I am convinced of the correctness of the opinion expressed by my predecessor, and if the department had jurisdiction over the matter, I should be constrained to sustain the views expressed by those officers. That this department has no jurisdiction over the lands in question, is, in my opinion, a porposition too clear to admit of a doubt or controversy, for the following reasons, viz:

1st. These lands were certified to the State by my predecessors, and their acts are final and conclusive, and binding upon me, as their successor in office. (*United States* v. *Bank of the Metropolis*, 15 Peters, 401; 2 Attorney Generals' Opinions, p. 9; id. 341; id. 29 and 123; id. 101, 301, 387; 12 id., 358; 13 id., 35, 226 and 456.)

2d. The certification of these lands invested the State with a complete legal title to the same (*Drury* v. *Hollenbeck*), which was in all respects equivalent to a patent.

As a general proposition, a patent is necessary in order to pass a perfect and consummate legal title to the public lands, with one exception, namely, where an act of Congress grants lands in words of present grant. And this proposition applies as well to pre-emption as to other purchasers of public lands. (3 Washburn Real Property, 192; *Wilcox* v. *Jackson*, 13 How., 516; *Grignon* v. *Astor*, 2 How., 319.) That this grant was a grant in *praesenti*, and became specific and certain by the definite location of the road, is settled by the opinion of Attorney General Cushing. (8 Opinions, 244 and 390.) The lands in question, therefore, fall within the exception above quoted. As the United States has no title to the land in question, this department cannot exercise jurisdiction over them.

Counsel for the applicants have requested me to ask the Attorney General to institute proceedings in the United States Courts, to determine the question of title to the lands.

More than fifty years ago, the Supreme Court of the United States decided as follows:

"The title of the respondent to the particular tract included in his patent was complete before that of the applicant commenced. It is not doubted that a patent appropriates lands. Any defects in the preliminary steps which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all of those whose rights did not commence previous to its emanation. Courts of equity have considered an entry as commencement of title, and have sustained a valid entry against a patent founded on a prior defective entry, if issued after such valid entry was made, but they have gone no further. They have never sustained an entry made after the date of the patent. They have always rejected such entries. A patent appropriates the land it covers, and that land being no longer vacant, is no longer subject to location. If the patent has been issued irregularly, the Government may find means for repealing it, but no individual has a right to annul it, to consider the land as still vacant, and to appropriate it to himself."

(Chief Justice MARSHALL, in the case of *Hoofnagle* v. *Anderson*, —— Wheat., p. 312.)

Brown and Darling settled after the legal title to the lands in controversy had passed out of the United States, and, under the above decision, they are mere intruders upon the land of another, without any legal or equitable right whatever. The right of the company to the lands outside of the 20 mile limit of the amended line of the road has been sustained by the judgment of the United States Circuit Court for the circuit within which they are located, and a further proceeding upon the same question before the same court, would, under the circumstances, be vexatious. The request of counsel is, therefore, refused.

These cases are dismissed for want of jurisdiction, and the papers transmitted with your letter of May, 3d, 1878, are herewith returned.

Very Respectfully,

C. SCHURZ, *Secretary*.

The Commissioner of the General Land Office.

No. XIV.

IN THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF IOWA.

J. W. DRURY
vs.
ANDREW HOLLENBECK.

This is an action of ejectment, brought by plaintiff against defendant, for the possession of the following real estate, to wit:

The plaintiff is the grantee of the Chicago, Rock Island and Pacific Railroad Company, a corporation existing under and by virtue of the laws of Illinois, and traces his title through mesne conveyances, to an act of Congress of May 15th, 1856. (11 St. at L., p. 9.)

It appears from the evidence that, following the above act of Congress, the State of Iowa, by act of General Assembly, passed July 14,

1856, accepted this grant, and apportioned it among several lines of railroad, then projected, and, among others, to that of the Mississippi and Missouri Railroad Company, organized to build a line from Davenport, on the Mississippi River, to a point on the Missouri River, at or near Council Bluffs. (Acts Ex. Sess. 5th G. A., p. 1.)

This legislation and the conditions contained in it, were accepted by said company.

In November, 1856, the line of the company's road was surveyed and definitely located on the ground, and a map filed, showing the location, in the Land Department at Washington.

In the same year, Bernhardt Henn, Esq., was, in pursuance of the above legislation, appointed agent to select indemnity lands for those odd numbered sections, lying within six miles of the line, that had been previously disposed of by the General Government; and under this appointment he selected the alternate odd numbered sections lying more than six and within fifteen miles of the definitely located line aforesaid, and notified the Land Department of such selection; and, in December, 1858, the Commissioner of the General Land Office certified all the alternate odd numbered sections undisposed of, including the lands in controversy, lying within 15 miles of said line, as falling within said grant.

In 1857, the legislature of Iowa, by its enactment, authorized the several railroad companies, mentioned in the act of 1856, to mortgage the said lands for the purpose of raising money to build their roads.

In pursuance of this authority, the Mississippi and Missouri Railroad Company mortgaged to Thos. E. Walker and others, its road bed, right of way, franchises, and the lands falling under said grant, to secure the bonds of said company, to the amount of $7,000,000, May 8, 1857.

This mortgage not being paid, was, in 1866, by decree of this court, foreclosed, and a master appointed to sell the same.

Sale was made the same year to the Chicago, Rock Island and Pacific Railroad Company of Iowa and all these lands, including that in controversy, were conveyed to said company by description, and such deed made of record in all counties through which such line passed, during the years 1866 and 1867.

In 1868, the said last named company, or rather a consolidated company, composed of this and an Illinois company, having completed its line to Des Moines, the Legislature of the State adopted some further legislation, concerning the grants of 1856, and confirmed the former grants to the Mississippi and Missouri Railroad Company to its successors.

Prior to this, however, and in 1864, Congress passed an act (13 St. at L., p. 95) authorizing the Iowa Companies to change a portion of their original line, the Mississippi and Missouri Company being authorized to change its line from Kellogg in Jasper County, to Council Bluffs; and by the same act another grant of lands was made, the grant covering *six* mile from the new line, and for indemity lands they were authorized to go twenty miles from the new line.

Iu accordance with this authority, the line was changed and finally built so as to run more than 20 miles from the land in controversy. At the date of the passage of the act of Congress of 1864, the Mississippi and Missouri Company had completed and was operating 120 miles of its railroad westward from Devenport. As appears from the evidence, the total amount of land certified to the State under the act of 1856, did not exceed or quite equal 400,000 acres. The entire length of the railroad commenced by the Mississippi and Missouri Company, and completed by the plaintiff's grantor, is about 330 miles. It also appears in evidence, that all the lands certified by the General Government, under the acts of 1856 and 1864 did not exceed 500,000 acres, In the fall of 1872, the defendant moved and settled upon this land, claiming that the change in the original line had operated as a forfeiture of the lands lying more than 20 miles from the new line. On the hearing he testified, that he knew the land had been claimed by the Railroad Campany, but that he was advised that the act of 1864 and the change of line operated to abandon these lands; and he proceeded to cultivate and build upon the land, intending to enter it under the homestead law. In January, 1873, Congress passed an act (17 Stautes at Large, p.) confirming the title to all lands theretofore certified to the Mississippi and Missouri Company, or the Chicago, Rock Island and Pacific Railroad Company, with the following proviso: "that this act shall be construed as conveying only any reversionary or other interests which the United States may have in said lands, and all lands settled upon in good faith, and now occupied by homestead or pre-emption settlers, shall be excluded from the operation of this act." Defendant claims to be protected under this proviso, arguing that plaintiff's title depends, in part, upon this legislation. By the act of Congress, of May 15, 1856, the roads described in this act were to be completed within ten years, and the following language, among other, was used: "If any of said roads are not completed within 10 years, no further sales shall be made, and the lands not sold shall revert to the United States." By the act of June 2d, 1864, the grant is made in the following terms: "The Secretary of the Interior shall cause to be certified, and conveyed to said company, from time to time, as the road progresses, out of any public lands, now belonging to the United States, not sold, reserved or otherwise disposed of, * * * within six miles of such newly located line, an amount of land per mile equal to that originally authorized to be granted, * * * by the act, to which this is an amendmendment." And in the 4th section, the following language is used in determining the grant made, in the act, to the Cedar Rapids and Missouri River Railroad, the line running parallel with and north of the Mississippi and Missouri line; "and no land shall be conveyed to said company, (meaning the Cedar Rapids and Missouri Company) situate and lying within 15 miles of the original line of the Mississippi and Missouri line, as laid down on map on file in the General Land Office." It is a conceded fact that this land is situated within 15 miles

of the original line of the Mississippi and Missouri Company, as shown by the map thereof on file in the General Land Office, and that it is more than 20 miles from the new or changed line, made in pursuance of the act of June 2d, 1864.

BY THE COURT:

Upon this statement of facts there can surely be no doubt that the plaintiff is entitled to judgment.

The title to the tract of land in controversy in this suit was, by the act of 1856, and the proceedings under it, vested in the State of Iowa.

The tract in question was within the terms of the act of 1856, and when it was selected and the selection approved and certified by the Commissioner of the General Land Office, the title became perfect in the State. Every act had then been performed, necessary to make the title of the State complete. (*Railroad Co.* v. *Courtright*, 21 Wal., 310; *Schulenberg* v. *Harriman*, 21 Wal,, 44; *Hicks* v. *Hughes*, 15 Wal., 123; *Lessieur* v. *Price*, 12 How.)

The title thus acquired, the State transferred to the Mississippi and Missouri Company, and authorized that company to mortgage it to raise money for the purpose of building the road. The Mississippi and Missouri Company did accordingly mortgage the lands, and upon the faith of this mortgage the bondholders advanced the money which was used in the construction of the road.

All this was fully accomplished long before the passage of the act of 1864.

It is clear that the right of the mortgagees could not be affected by that act without their consent. It was entirely incompetent for Congress, by any legislation whatever, direct or indirect, to divest the title of the mortgagees without their own concurrence. Congress might, of course, have authorized the railroad company to change its line, and with the assent of that company, Congress might have given other lands upon the changed line in lieu of those which had been previously granted. But it was surely incompetent for Congress, with or without the concurrence of the railroad company, to divest the title of the mortgagees. If Congress, with the concurrence of the railroad company, could have divested the mortgagees of the particular tract in controversy, it was equally within their power to have divested them of the entire body of the mortgaged lands. The proposition that the title of the mortgagees could not be so affected, is too plain for argument or illustration. See on this point *Rice* v. *Railroad Company*, 1 Black, 358.

Nor is it probable that Congress intended, by the act of 1864, to do what clearly it had no power to accomplish, by any legislation whatever. What was the purpose of Congress in passing the act of 1864? It was perhaps this. The railroad company had fixed and established their line originally with more or less haste, with a view to secure the lands within the prescribed limits. To hold them strictly to that line in the construction of the road, would have been perhaps highly prejudicial to their own interests, and also to the interests of

the public, in the future operation of the road; for both the company and the public were interested in having it built upon the most elegible line. Congress did not perhaps suppose that this company would deviate to any very great distance from the line already established; five miles on either side of the line would, perhaps, have given the company sufficient latitude for all practical purposes in the location and construction of the road, but the result of this might have been that some of the lands, within the original 15 miles limit, would have been more than 15 miles from the new line. Congress therefor extended the limit to 20 miles, so that if the company changed the lines to any distance within 5 miles of the original line, the lands embraced in the original 15 miles would all be within the new limit. And since it was evident, at the time of the passage of the act of 1864, that the quantity of land within original 15 mile limit was much smaller than had been contemplated when the act of 1856 was passed, and since the company had received a less quantity than they would have been entitled to, if the lands had not been sold by the Government, for the number of miles actually built at the time of the passage of the act of 1864, Congress was willing to enlarge the grant, not only by extending the limit to 20 miles, but also by removing the restriction as to the odd numbered sections.

It is probable that the limit was fixed at 20 miles, as suggested above, to preserve the harmony of the grant. And in this view it is clear that Congress had no purpose whatever to disturbe the title to lands which had already vested within the 15 mile limit. Congress must have known that the title to the lands which had been selected, approved and certified within the original 15 mile limit had passed from the Government, and that the lands had been mortgaged to parties who furnished the money with which 120 miles of completed road had been built. Congress must have known that by the clearest principles of law, as well as the expressed adjudication of the Supreme Court, there was no power in the legislative department of the government to take away the title or affect the vested right of the mortgagees to the lands in question, and it is clear that Congress had no such intention in passing the act of 1864 and 1873.

It turned out however, that the Company in changing their line, diverged more than five miles from the originally established line, and thus, threw some of the lands originally selected and approved within the original 15 mile limits, beyond the limits of 20 miles prescribed in the act of 1864. Now, this could have thrown no doubt whatever upon the right or title of the mortgagees, but it may have raised a question as to the equity at least of the company's title to the newly selected lands within the twenty mile limit, and I have no doubt that the chief purpose of the act of 1873, (17 St. at L., 421) (although its terms are general and applicable to all previous grants) was to remove any doubt as to the title of the Railroad Co. to the newly selected lands within the twenty mile limits of the act of 1864. And if this view be correct, the proviso to the act of 1873 was intended only to be

applicable to the lands thus selected, within the twenty mile limits, and certainly not to lands which had been selected, approved, certified and mortgaged, under the act of 1856.

But whether this reasoning and this exposition of the legislation of 1864 and 1873 be correct or not, does not in the least affect the conclusion to which the Court has arrived upon the most solid ground, wholly independent of this reasoning, namely: that Congress had no power to disturb the vested title of the mortgagees without their own consent. Whether, therefore, it was the purpose of Congress, with or without the concurrence of the Railroad Companies, to disturb the title of the mortgagees, is a matter of no logical consequence whatever.

The title to the land in controversy, was, by regular foreclosure proceedings, transferred to the Chicago, Rock Island and Pacific Railroad Company, and by that company conveyed to this complainant. The defendant resists the complainants' title, under what he claims to be the effect of the legislation of 1864 and 1873. But the ground of his resistence is clearly untenable.